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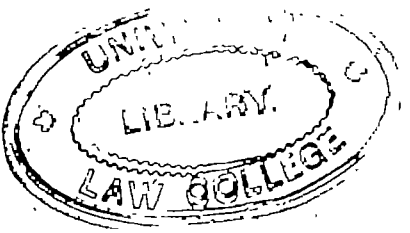

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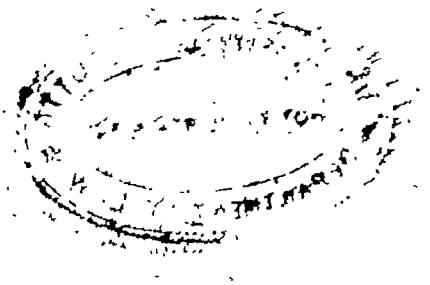

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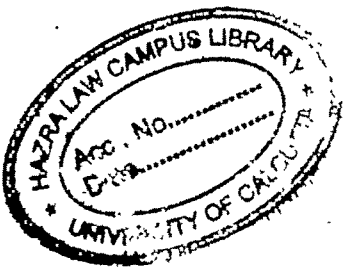

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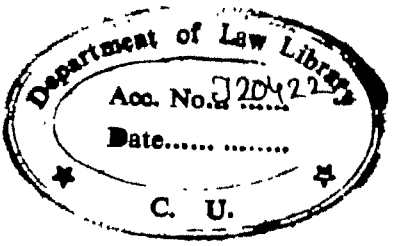

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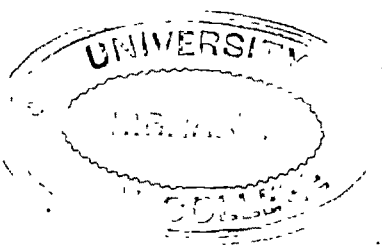

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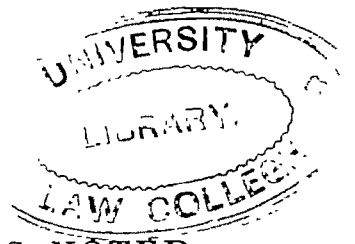

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RECENT DEVELOPMENTS IN THE DOCTRINE OF CONSIDERATION

In the law, as in everything else, it is a good thing to take stock from time to time and to see how things stand. That is what it is proposed to do in this article—to see how things stand at present in regard to the doctrine of consideration. It has certainly been much modified of late and the question is sometimes asked how far it remains an essential element of our law of contract. It is here proposed to consider, first, its place in the formation of contract, and secondly, its place in the modification or discharge of contract. Let us put aside the common bilateral contract—a promise for a promise—because there is rarely any difficulty about consideration there. Each promise is the consideration for the other. Let us consider only the common unilateral contract—a promise for an act—because that is where the difficulties arise.

The purpose of this article is to suggest that, both in the formation and in the discharge of contract, while keeping the doctrine of consideration, we are tending to regard any act done on the faith of the promise as sufficient consideration to support it, even though the act done is no benefit to the promisor and no detriment to the promisee.

I. The Formation of Contract

The law for centuries has been that an act done at the request of another, express or implied, is sufficient consideration to support a promise. See the notes to *Lampleigh* v. *Braithwait* (1616) 1 Sm.L.C. 148; *Osborne* v. *Rogers*, 1 Wms.Saund. 264. Modern developments show that the promise must be intended to create legal relations (*Rose and Frank* v. *Crompton* [1928] 2 K.B. at pp. 288, 293); and that a request will be implied whenever it can be inferred that the promisor intended that his promise should induce the other to do some act or forbearance on the faith of it: *Crears* v. *Hunter* (1887) 19 Q.B.D. 341. Thus when a man promises to give security for an existing debt, on the faith of which the creditor forbears to sue for it, the law will imply a request for forbearance. It is not necessary that the creditor should make any promise to forbear. The mere fact of forbearance is good consideration: *Alliance Bank, Ltd.* v. *Broom* (1864) 2 Dr. & Sm. 289; *Wigan's Case* [1909] 1 Ch. 287. The only essentials are the

promise by the one and the forbearance by the other on the faith of it. Even though there was no request in fact for the forbearance, nevertheless if the promise was given with the intention of inducing the creditor to forbear on the faith of it, the law will imply a request: *Glegg* v. *Bromley* [1912] 3 K.B. 474; *Re Wethered* [1926] 1 Ch. 167. In these circumstances it may be well that, instead of using the old language of "request" and "consideration" we can express the self-same principle by saying that a promise is binding in law if it was intended to create legal relations, intended to be acted upon and was in fact acted upon by the person to whom it was given. Intention in this connection should, of course, be judged objectively and not subjectively. The promisor should be taken to intend what a reasonable man receiving the promise would believe him to intend. In the cases on forbearance, it is usually plain that when a man promises to give security for a debt, he intends that the creditor should forbear. In those cases the promise is binding when it has been acted upon, but not otherwise: *Oliver* v. *Davis* [1949] 2 K.B. 727. But there are some cases when the giving of a promise does not import a request to do anything, and does not convey an intention that it should be acted upon. A good illustration is given by the recent case of *Combe* v. *Combe* [1951] 2 K.B. 215. A wife who had obtained a decree against her husband asked what amount he would pay her by way of permanent maintenance. He said he would pay her £100 a year free of tax. The Court of Appeal held that that did not mean that she should forbear from applying for maintenance. It is well known that agreements of that kind are made as a preliminary to an application for maintenance. They form the basis for a consent order to be approved by the court. The agreement, therefore, so far from being an implied request to forbear from applying to the court, was almost an invitation to her to apply to the court. Her forbearance was therefore no consideration.[1]

The other modern development is the gradual disregard of "benefit" and "detriment." In former times the act done, in order to be good consideration, had to be a benefit to the promisor or a detriment to the promisee. Those phrases were historically intelligible. "Benefit" conveyed the notion of a *quid pro quo*. "Detriment" conveyed the tortious origin of the action of the assumpsit. But nowadays there are some grounds for suggesting that an act may be good consideration even though it is not a benefit to the promisor nor a detriment to the promisee. If a man promises a charitable institution that he will pay £100 into its funds if it procures nine other persons to do the same, justice requires that his promise should be held to be binding on him as soon as it has procured the nine others to pay £100 each; but the

[1] It is suggested in a recent note that this explanation was not a "rational explanation," see 67 L.Q.R., at p. 458.

act done by the institution is not a benefit to him nor a detriment to the institution. If a man promises to pay a friend of his £100 if the friend marries the lady to whom he is engaged, then the promise is binding on the promisor as soon as the friend marries the lady, even though the marriage is no detriment to the friend and no benefit to the promisor. There is no modern case to this effect but the old cases of *Shadwell* v. *Shadwell* (1860) 9 C.B. (N.S.) 159; *Scotson* v. *Pegg* (1861) 6 H. & N. 295; *Chichester* v. *Cobb* (1866) 14 L.T. 488 were certainly correct decisions; and it is suggested that the most satisfactory explanation of them is that an act done is good consideration even though it is no benefit to the promisor and no detriment to the promisee. This new conception of consideration may have an important bearing on the vexed question of a promise to keep an offer open for a fixed time on the faith of which the option-holder acts. The act done may be good consideration even though it is no benefit to the promisor.

II. The Modification or Discharge of a Contract

The law for centuries has been that a promise to waive, modify or discharge the strict terms of a contract needs to be supported by consideration just the same as any other promise. In former times no one saw any distinction between a promise given in formation of a contract and a promise given in discharge of a contract. It was Sir Frederick Pollock who first pointed it out in his book on contracts (12th ed., at p. 142), when he said: "The doctrine of consideration has been extended, with not very happy results, beyond its proper scope, which is to govern the formation of contracts, and has been made to regulate and restrain the discharge of contracts." Once attention is drawn to it, however, it becomes obvious that the two things are in fact quite different. There is a new factor present in the modification or discharge of a contract which does not occur on the formation of a contract. That new factor is that each party is already bound in law to perform his part of the existing contract; and it is that very factor which has caused all the trouble about consideration. It was often used by the common lawyers so as to deny the existence of consideration and hence to deny the validity of the promise. They said that if the promisee merely did that which he was already bound to do—or less than he was already bound to do—that was no sufficient consideration to support a new promise. There was no satisfaction —no benefit—to the promisor in receiving what he was already entitled to; and there was no detriment to the promisee in doing what he was already bound to do. This was their reason for saying that, when an ascertained sum is already due under a contract, payment of a less sum is no consideration for a promise to forgo the remainder: *Pinnel's Case* (1602) 5 Co.Rep. 117a. Likewise they said that when a seller, who is already bound by a

contract to deliver by a certain date, afterwards requests the buyer to extend the time, then a promise by the buyer to accept delivery at a later date is not binding on him because the seller has given no consideration for that promise: *Plevins* v. *Downing* (1876) 1 C.P.D. 220. Such reasoning received the sanction of the House of Lords in *Foakes* v. *Beer* (1884) 9 App.Cas. 605; and must still be applied in determining the strict legal rights of the parties.

But strict legal rights are always capable of being modified by the interposition of equity; and that is what has happened in the discharge of contracts. The courts have repeatedly invoked equitable principles so as to neutralise ill effects of the common law doctrine of consideration. They have not done so in the formation of contract, because there was no necessity there for the intervention of equity. They have only done so in the modification or discharge of contracts. The principle of equity was stated by Lord Cairns in the House of Lords in *Hughes* v. *Metropolitan Ry.* (1877) 2 App. Cas. 439, and explained by Bowen L.J. in *Birmingham and District Land* v. *L. & N. W. Ry.* (1888) 40 Ch.D. 268. Taking the two judgments together, this is the principle: it is the first principle upon which the courts of equity proceed, that if the parties who have entered into definite and distinct legal terms involving certain legal rights, afterwards by their own act or with their own consent, enter upon a course of negotiation or otherwise so conduct themselves as to induce one of the parties to suppose that the strict rights arising under the contract will not be enforced or will be kept in suspense or held in abeyance, the persons who otherwise might have enforced those rights will not be allowed to enforce them when it would be inequitable, having regard to the dealings which have thus taken place between the parties.

There are several things to be noticed about this principle:

First, it applies only to parties who have already "entered into definite and distinct legal terms." It applies therefore only to parties who have already entered into a contract, not to those about to enter into one. It can only apply therefore to the modification or discharge of an existing contract, not to the formation of a new contract.

Secondly, it extends to any conduct which induces the other party to believe that the strict rights under the contract "will not be enforced or will be kept in suspense." The conduct is not confined to promises. It is any conduct. But it certainly includes promises. The most emphatic conduct of all is a deliberate promise not to enforce the rights or to keep them in suspense. Such a promise is clearly sufficient to bring the principle into play.

Thirdly, in seeing whether a party will be allowed to enforce his strict rights, the criterion is whether it would be "inequitable having regard to the dealings which have taken place between the parties." That means that, in cases where the conduct consists

of a deliberate promise not to enforce his rights, the criterion is, not whether there is any consideration for the promise, but whether it is "inequitable" that he should be allowed to go back on it.

The result is, therefore, that, so far as concerns promises to waive, modify or discharge the strict legal rights arising under a contract, there is a conflict between the rules of common law and the rules of equity. Common law requires the promise to be supported by "consideration" before it will be enforced: but equity will not allow the promisor to go back on it if it would be "inequitable." In this conflict, the Judicature Acts say that the rules of equity are to prevail.

III. THE TEST OF WHAT IS "INEQUITABLE"

There still remains the question, when is it "inequitable" to allow a person to go back on his promise? The test of what is "inequitable" may be different when there is a promise from that when there is some other conduct which leads the other to believe that the strict rights will not be enforced. A promise has always been considered to be different in nature and quality from conduct of negligence or omission. A man should keep his word. All the more so when the promise is not a bare promise, but is made with the intention that the other party should act upon it. Just as contract is different from tort and from estoppel, so also in the sphere now under discussion promises may give rise to a different equity from other conduct.

The difference may lie in the necessity of showing "detriment." Where one party deliberately promises to waive, modify or discharge his strict legal rights, intending the other party to act on the faith of the promise, and the other party actually does act on it, then it is contrary, not only to equity but also to good faith, to allow the promisor to go back on his promise. It should not be necessary for the other party to show that he acted to his detriment in reliance on the promise. It should be sufficient that he acted on it. That is sufficient in the case of promises given on the formation of a contract. It should also be sufficient in the case of a promise given on the modification or discharge of a contract.

But where the party has made no promise, express or implied, and all that can be said against him is that he by his conduct has induced the other to believe that the strict rights under the contract will not be enforced or kept in suspense, then the position is different because there is no question of good faith—no question of a man keeping his word. In those circumstances it may be necessary for the other party to show not only that he acted, but also that he acted to his detriment, in the belief that the strict rights would not be enforced. That is what is necessary in the case of an estoppel and there is no good reason why it should not be necessary here.

It must be acknowledged that the foregoing distinction has not yet been drawn in the cases, but it is interesting to notice that the actual decisions are all consistent with it.

IV. The Cases on Promises

When a party acts on the faith of a promise, the act done is often to his detriment. In those cases the point—whether detriment is necessary or not—does not arise. Such a case was *Fenner* v. *Blake* [1900] 1 Q.B. 426, where a tenant promised to give up premises at midsummer, and on the faith of the promise the landlord sold the premises with a right to vacant possession at midsummer. That was clear action to his detriment, and the tenant was held bound by his promise. So also in *Robertson* v. *Minister of Pensions* [1949] 1 K.B. 227 the War Office gave a written assurance to an officer that his injury was accepted as attributable to war service. On the faith of the assurance the officer forbore to get a medical opinion in support of his claim. That was clear action to his detriment and the Crown was held bound by the assurance.

There are some cases, however, where a party acts on the faith of a promise but does not act to his detriment. In those cases the point—whether detriment is necessary—does arise. The cases seem to show that the promisor has been held bound by his promise, even though he has suffered no detriment, so long as he has acted on the faith of the promise. That was so in the case of *Central London Property* v. *High Trees House* [1947] K.B. 180 where, owing to war conditions, a landlord promised to accept less rent for the premises than the sum provided in the lease. On the faith of the promise the tenant remained in the premises paying the less sum. It is difficult to see that this was any detriment to him. It was indeed a benefit to him. But does that mean that the landlord should be allowed, years afterwards, to go back on his promise and to claim the full rent for the back periods? It would be most inequitable that he should be allowed to do so. The case falls directly within the principle laid down by Lord Cairns in *Hughes* v. *Metropolitan Ry.* (1877) 2 App.Cas., at p. 448.

The observations in the *High Trees Case* have been said to be *obiter*, but the same cannot be said of the decision of the Court of Appeal in *Foster* v. *Robinson* [1951] 1 K.B. 149. In that case a farmer let to one of his men a cottage at £8 5s. payable every half-year. After many years of service the man retired and a conversation took place which the farmer described in these words—it was the only evidence on the point—"I told him the existing tenancy would cease and I would charge him no more rent and he could live there the rest of his life rent free. He said 'Thank you very much' and said he was very pleased to accept the condition." On the faith of the farmer's promise the man stayed in the house

paying no rent until, four years later, he died. Thereupon his daughter, who had lived with him for nine years, claimed that she was entitled to the house as his administratrix and successor to his tenancy. It was held by the Court of Appeal that the man was not a tenant at the time of his death but only a licensee for life and that he had no tenancy capable of transmission to the daughter. The question turned on whether the man had surrendered his tenancy, and that depended on the conversation between the farmer and the tenant four years before. It clearly did not operate as a surrender by the act of the party, because it was not by deed or in writing. It was a surrender by operation of law because—and this is the point—the landlord's promise was binding on him. The landlord had made a deliberate promise that the man could stay in the house rent free for the rest of his days. The man acted on the promise by staying in the house and paying no rent. That was no detriment to the man. It was to his benefit. But nevertheless the Court of Appeal held the promise binding on the landlord. Being binding on him, it created a licence which was inconsistent with the continuance of the tenancy and thus effected a surrender by operation of law. The Master of the Rolls, Sir Raymond Evershed, expressly said that the promise was binding on the landlord: "If the landlord having made the arrangement sought to revoke it, he would be restrained by the court from doing so. Thus the result is arrived at that the tenant was entitled as licensee to occupy the premises without charge for the rest of his days and did so." Now it cannot be said that the surrender was itself a consideration sufficient to make the promise binding. That would indeed beg the question: because there would be no surrender unless the promise was binding. The promise must first be held binding before you can say there was any surrender. And why was the promise held binding? Not because the man gave any consideration for it, for he had given none except his past services, and a past consideration is no consideration in law. It was binding on the landlord simply because the man had acted on it. The Master of the Rolls made that clear when he went on to say "It is not a question of mere agreement here; there was here an agreement and *super-added acts in pursuance of the agreement* sufficient to show that effect in the fullest sense was given to the agreement, the new agreement being inconsistent with the continuance of the old tenancy." It is submitted that the case of *Foster* v. *Robinson*, although not expressly founded on the *High Trees Case*, is based on the self-same principle.

The decision in *Foster* v. *Robinson* is undoubtedly complicated by the question of surrender: but the complication did not arise in the more recent case of *Wallis* v. *Seamark* [1951] 2 T.L.R. 222. There a house was let fourteen years ago at 16s. a week and the rent book stated "one month's notice each party." Four years

later the words "each party" were scratched out and the alteration was made "one month's notice from tenant; two years' notice from landlord" and initialled by the landlord's agent. There was no other evidence of the agreement, but the alteration clearly evinced a promise from the landlord that he would not turn the tenant out except on two years' notice. The tenant acted on that promise by remaining on and paying the rent. There was no evidence that the tenant's act in remaining was any detriment to the tenant, but nevertheless the promise was held to be binding on the landlord, and the reason was because the tenant had acted on it. Somervell L.J. said "The consideration is the tenant's remaining on and paying the rent." This use of the word "consideration" is interesting. It accords with the modern view that an act done is consideration, even though it is no benefit to the promisor and no detriment to the promisee.

These cases seem to warrant the conclusion that in cases of deliberate promises which are intended to create legal relations it is sufficient if they are acted upon, even though there is no detriment in so acting.

V. Cases on Conduct

When there is no promise, but only some lesser conduct—which leads the other party to believe that the strict rights arising under the contract will not be enforced or kept in abeyance,—the cases show that detriment is necessary. The original party is not to be debarred from enforcing his rights unless the other has acted to his detriment on the belief, and then only to the extent that his position has been prejudiced by it. If the original party can, by notice or otherwise, remove the prejudice, then the strict rights revive.[2]

That was the position in the two original cases *Hughes* v. *Metropolitan Ry.* (1877) 2 App.Cas. 485 and *Birmingham & District Land Co.* v. *L. & N.W. Ry.* (1888) 40 Ch.D. 268. In *Hughes* v. *Metropolitan Ry.* the landlord, during the currency of a six months' dilapidation notice, entered into negotiations with the tenant for the purchase of the lease. Later the negotiations broke down. The House of Lords held that the six months' dilapidation notice did not begin to run until the negotiations broke down. The tenant was therefore protected only to the extent that his position was prejudiced by the negotiations. In the *Birmingham Case* a tenant under a building lease was bound to build within a specified time. The landlord requested the tenant not to build until the result of certain negotiations was known. It was held that the landlord could not afterwards insist on the strict contractual time until notice was given to the tenant giving him a reasonable time to complete the building. The tenant again was only

[2] This matter is well discussed by Mr. J. F. Wilson in 67 L.Q.R. 380.

protected to the extent that his position had been prejudiced by the landlord's request. So also in *Panoutsos* v. *Raymond Hedley* [1917] 2 K. B. 478, the sellers, who had by their conduct waived the necessity of payment by confirmed banker's credit, were not allowed afterwards to demand a confirmed credit without giving reasonable notice beforehand. In all these cases the party who had, by his conduct, led the other to believe that the strict legal rights would not be enforced, was not debarred altogether from enforcing them. He was allowed to enforce them on giving reasonable notice. That meant that he was only debarred from enforcing his legal rights to the extent that the other party was prejudiced.

There have, moreover, been recent cases in the Court of Appeal which proceed on the same principle. In *Charles Rickards* v. *Lothian* [1950] 1 K.B. 616, a motor car dealer, who had agreed to do work on a car by a certain time, was late in delivery. Notwithstanding the delay his customer repeatedly requested delivery, and on the faith of the request the dealer did much work in an attempt to comply with it. It was held that the customer by his conduct had waived his strict rights as to time and could not insist on them except on giving reasonable notice.

VI. CONCLUSION

The result would appear to be that the wide equitable principle stated by Lord Cairns in *Hughes* v. *Metropolitan Ry.* can be divided into two distinct branches:

1. Cases where there is a promise by one party to waive, modify or discharge his strict legal rights, such promise being intended to affect their legal relations and to be acted on by the other party. In those cases the promise is binding as soon as the other party has acted on it, and the only question then that can arise is as to the true interpretation of the promise. These cases seem to fall more naturally under the law of contract, rather than the law of estoppel.

2. Cases where there is no promise but only conduct by one party which leads the other party reasonably to believe that the strict legal rights will be waived, modified or discharged. In those cases the first party will not be allowed to insist upon his strict legal rights after the other party has acted to his prejudice unless he first takes steps to remove the prejudice. These cases can be brought into the first branch by means of an implied promise, but it seems better to regard them as a kind of estoppel.

If one compares the cases concerning promises on the formation of a contract, with those concerning cases on its modification and discharge, it would seem that, since the fusion of law and equity, we are approaching a state of affairs which Ames regarded as desirable, namely, that any act done on the faith of a promise

should be regarded as sufficient consideration to make it binding. If the law should develop in this way, nearly all the recommendations of the Law Revision Committee will be achieved without recourse to legislation at all.

A. T. Denning.[3]

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[3] The Rt. Hon. Sir Alfred Denning was appointed a judge of the High Court of Justice in 1944 and a Lord Justice of Appeal in 1948. He is the author of *Freedom under the Law* (Hamlyn Lectures, 1949).

WHEN IS A DOCUMENT FALSE IN THE LAW OF FORGERY?

THERE have recently been two important articles on the definition of " document " in the law of forgery,[1] but little seems to have been written on the problem of when a document is false. Even the larger textbooks do little more than give a string of cases without making a serious attempt to correlate and elucidate them. Yet the cases on the topic are not easy: in most of them detailed reasons for the decisions are not found in the reports, and in some there is a failure to cite relevant authorities. In these circumstances it is not surprising that there is at times conflict between different precedents, and that the law has developed in a haphazard manner.

It is here proposed to consider four of the aspects of making a false document which seem to demand special treatment. Making a false document by

(1) Signing a fictitious name;
(2) Passing off an otherwise true document by false representations dehors the instrument;
(3) Signing one's own name;
(4) Writing a false address or description to a true signature.

It is hoped to show that in the last three cases the law of forgery has departed from its early principles in the matter, in each case so as to enlarge the scope of the offence.

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(1) *Signing a fictitious name.*

It was doubted until 1754 whether a document executed in a fictitious name could ever constitute a forgery, but in that year eleven of the judges met to consider the case of *Anne Lewis*,[2] and approved the conviction of the prisoner. She had been indicted for uttering a forged power of attorney, purporting to be executed by a fictitious Elizabeth Tingle, alleged to be the daughter of a deceased seaman, who had in fact died childless. The object of the prisoner was to obtain prize-money which was due to the deceased, and would have been recoverable by his next-of-kin had he left any.

The next important case, eleven years later, *R.* v. *Dunn*,[3] is similar in that the alleged falsity consisted in the signature of an apparently non-existent person, the widow of a deceased seaman, Wallace, who, so far as the evidence showed, left no widow. The prisoner personated the " widow " of the seaman to whom wages

[1] Mr. J. W. C. Turner, 82 Va.L.R. 939; Professor Glanville Williams, 11 M.L.R. 150.
[2] Fost. 116; 168 E.R. 57 (C.C.R.).
[3] 1 Leach 57; 2 East P.C. 976; 168 E.R. 131 (C.C.R.).

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were due, and induced the prosecutor to advance her money on her own promissory note, which she executed in his presence in the name of Mary Wallace. The charge was of forging and uttering this promissory note. The case was reserved for the consideration of all the judges, of whom nine were for conviction, Aston J. dissenting. The basis of the decision is that Dunn obtained superior credit by the use of the fictitious name: the prosecutor would not have lent money to her, had he not believed her to be entitled to the wages which he knew were due to Wallace. The judges agreed that "in all forgeries the instrument supposed to be forged must be a false instrument in itself; and that if a person give a note entirely as his own, his subscribing it by a fictitious name will not make it a forgery, the credit there being wholly given to himself, without any regard to the name, or any relation to a third person." [4] Pausing there, it appears that the judges would consider such a case as they pose not to be forgery, because the instrument would not be a false one. Then they argue that if a superior credit is obtained by the fictitious name the document is false, because the prosecutor is materially deceived thereby. It is submitted that this reasoning is fallacious, and that forgery, as distinct from the statutory felony of obtaining property on forged instruments enacted in section 7 of the Forgery Act, 1913,[5] is a crime which is independent of the state of mind of the prosecutor. It is suggested that the only reason there may be no forgery in such a case is that no intent to defraud can be proved, and, however false the instrument, there is of course no forgery of a private document without such an intent. This is perhaps recognised implicitly in a subsequent passage in *R.* v. *Dunn*, where the court is reported as saying: "If an instrument be false in itself, and by its purporting to be the act of another, a credit is obtained, which would not otherwise have been given, it is a forgery." There seems, therefore, to be some ambiguity in the dicta in *Dunn's Case*. The rule of law is clearly laid down that, if a person gives a note entirely as his own, his subscribing it by a fictitious name will not make it a forgery, but it is not so clear whether this is because the instrument is not false, or because there is no intent to defraud thereby.

The dicta in *Dunn's Case* are of importance, because they form the *ratio decidendi* of the decision of five judges of the Court for Crown Cases Reserved in *R.* v. *Martin* (1879).[6] There the prisoner bought a pony and chaise from one Lee, who had long known him, and in payment gave a cheque on a bank where his account had been closed some months previously, drawing it in the presence of Lee in the name of William Martin, whereas his real name was Robert Martin. Lee pocketed the cheque unread. Martin was clearly guilty

[4] This quotation and the hypothetical case considered are of great importance, as they are the foundation of the difficult case of *R.* v. *Martin* (1879), shortly to be discussed.

[5] Re-enacting ss. 38, 39, Forgery Act, 1861.

[6] 5 Q.B D. 34; 49 L.J.M.C. 11; 41 L.T. 581; 14 Cox 375 (C.C.R.)

of obtaining by false pretences, as he knew the cheque would not be met: *R.* v. *Haselton* (1874),[7] but he was indicted for forgery and convicted. Cockburn C.J., the trial judge, in reserving the case, explains that his doubts arose because Martin drew and uttered the cheque as his own, and did not obtain credit from Lee by the use of the false Christian name. The substitution appears to the judge to be without motive, though it occurs to him that Martin may have believed, wrongly of course, that he would escape liability to be sued on the cheque by using a false name. No counsel appeared on either side, and the five judges quashed the conviction in a nine-line judgment, most of which was taken up with the first quotation given above from *Dunn's Case*.

It is submitted that it is better to regard *Martin's Case* as a decision not that there was no false instrument, and therefore no forgery, but that there was no intent to defraud by means of the false signature and therefore no forgery. The former view is to be rejected, in the first place as not in accord with the previous decisions of the Court for Crown Cases Reserved in *R.* v. *Sheppard* and *R.* v. *Whiley*, which were not cited, secondly as not the real influence that led to the judicial " hunch " in favour of Martin, and thirdly as not based on a true conception of the essence of forgery.

First to consider the conflicting authorities. In *R.* v. *Sheppard* (1782)[8] the prisoner was indicted for uttering (East says " for forging ") a banker's draft knowing it to be forged. The falsity of the instrument was alleged to consist in the signature of the drawer " H. Turner." This was a fictitious name. The prisoner offered this draft to Elliott, a silversmith, in payment for some goods. Elliott, imagining it to be the prisoner's own draft, wrote the name " Turner " in his order book, and the prisoner supplied him with a fictitious address. Elliott testified that he gave credit to the prisoner, as his appearance was genteel, and not to the draft. Nevertheless the prisoner's conviction was upheld by twelve judges, as the fictitious name was used only for the purpose of deceiving. The full reasons are not given in the report, but *Dunn's Case* among others was relied on. In the subsequent case of *R.* v. *Aickles* (1787),[9] there was a difference of opinion among the judges, some holding that there is no forgery where the document is made by the prisoner as his own, and credit is given by the prosecutor to the person and not to the name, but these doubts were set at rest by two cases of 1804 and 1805, when the same point was reserved in view of the difficulty of reconciling the cases, and all the judges held that the conviction was right, there being no doubt as to the intent to defraud: *R.* v. *Marshall*,[10] *R.* v. *Whiley*.[11] *Whiley's Case* is a particularly clear one.

[7] L.R. 2 C.C.R. 134.
[8] 1 Leach 226; 2 East P C. 967; 168 E R. 215 (C.C.R.).
[9] 2 East 968; 1 Leach 438; 168 E.R. 321 (C.C.R.).
[10] R. & R. 75; 168 E.R. 691 (C C.R.)
[11] R & R. 90; 168 E.R. 699 (C.C.R.).

He was indicted for forging and uttering a bill of exchange for sixty pounds, drawn in the name of Samuel Milward (a fictitious name), payable to his own order. The prisoner ordered goods from Thurston, value forty-nine pounds ten shillings, gave him the bill in question, and obtained from him ten guineas in cash. The bill was dishonoured. Thurston testified that he did not know the prisoner, and would have given him equal credit had he signed his real name of Samuel Whiley. All the judges upheld the conviction.

The only difference between the facts in *R.* v. *Martin* and those in *R.* v. *Sheppard* and *R.* v. *Whiley* is that Martin was previously known to his dupe, whereas Sheppard and Whiley were not. The decisions in *Sheppard* and *Whiley* show that in the crime of forgery the state of mind of the prosecutor is not material: whether he gives credit to the document or not, the prisoner may still be guilty of forgery. The difference in *Martin's Case* is that the prisoner and prosecutor are well known to each other. The prisoner is, therefore, aware that if credit is given to him it will be to him as a person, and not on the faith of the particular name by which he signs the document. To append a false signature in such a case appears to be without motive. Generally a man is presumed to intend the natural consequences of his acts, and if he uses a false name the intent to defraud thereby will readily be presumed. But if the act of the prisoner appears to be without motive, the court will hesitate to apply the presumption, and a conviction may well be quashed. It is suggested that this is the underlying reason why the conviction of *Martin* was quashed: the court refused to find an intention to defraud as the act appeared to be without motive. Kenny treats the case as a decision that the instrument was not a false one.[12] It may be admitted that superficially this is a correct interpretation of the *ratio decidendi*. The judgment is very brief, and consists mainly of the quotation from *Dunn's Case*, which strongly supports the view that the decision in *Martin* is based on the fact that the instrument was not false. It is, however, submitted that what seems to have been worrying Cockburn C.J., when he reserved the case, was the absence of motive. He does not appear to have *Dunn's Case* in mind. The case comes before five judges, and it is Hawkins J. who refers to *Dunn's Case*. The chief justice is now content. He had no desire to convict, and now that authority has been provided to support his view, the conviction is quashed. Cross and Jones use the case as a good illustration of the necessity of proving an intent to defraud.[13] It is suggested that this is the true and underlying basis for the decision, though it cannot be extracted from the brief judgment, and the learned authors might well explain that they are

[12] *Outlines of Criminal Law*, 15th ed., 300. Also *Russell on Crime*, 1458 (10th ed., 1950).
[13] *Introduction to Criminal Law*, 2nd ed., 208.

regarding *Martin's Case* as a right decision for the wrong reasons, or at least a case where actions speak louder than words.

There are two cases dealing with another branch of the law of forgery which strengthen the two conclusions here drawn, firstly that the reasoning in *Dunn's Case* is fallacious in regarding the fact that the prosecutor was materially deceived as relevant in deciding whether the document is false, and secondly that *Martin's Case* is explicable as a decision on the absence of intent to defraud, the motive not being apparent. These authorities deal with the question whether there can be forgery, although in fact no person could have been defrauded by the false instrument. In *R.* v. *Marcus* (1846) [14] the prisoner, a stockbroker, was indicted for forging and uttering a deed of transfer of ten shares. He bought one hundred shares from R in L's name without any authority from L, counterfeiting L's signature. He then transferred ten of these shares to B, again counterfeiting L's signature. Cresswell J. directed an acquittal, as he could not discover that anyone could conceivably be defrauded, not R because Marcus paid him for the shares, not L because under no circumstances could he be required to pay any money, not B because he received the shares he paid for, nor the company because, the shares being fully paid, the substitution of the credit of another person could not harm the company. Cresswell J. observed at p. 861: "There must at all events be a possibility of some person being defrauded by the forgery." In Archbold [15] this statement is contrasted with that of Maule J. in *R.* v. *Nash* (1852) [16]: "The Recorder seems to have thought there must have been someone capable of being defrauded by the forgery. That is not necessary." The indictment in *Nash's Case* was for forging transfers from H to the prisoner of partly paid shares in a railway company. The company was in a precarious position, paying no dividend, and the question of winding up had been considered. The shares had no market value. The Recorder left the question of intent to defaud to the jury. He pointed out that H might be defrauded if the position of the company improved, or the company if it made a call, or anyone who bought from the prisoner. The conviction was upheld by the Court for Crown Cases Reserved. The conflict between the views of Maule J. and Cresswell J., at which Archbold seems to hint, is not a real one. Cresswell J. was also a member of the court in *Nash's Case*, and explains his part in the earlier case of *Marcus* at p. 150: "It seems that I thought there was no proof of an actual intention to defraud anyone. The observation that there must be someone to be defrauded was made with reference to the legal principle that you must impute to a man the intention of producing the necessary consequences of his act, and to the fact that no other ground was

[14] 2 C. & K. 856; 175 E.R. 147.
[15] 32nd ed., 791.
[16] 21 L.J.M.C. 147, 149 (C.C.R.)

shown for imputing an intention to defraud in that case, but the possibility that the individuals named might have been defrauded." In other words, the presumption that a man intends the natural consequences of his acts will not be applied where the act appears to be without motive, and on this basis Marcus and Martin are acquitted of forgery. One can imagine that had it fallen to Cockburn C.J., to consider his remarks in *R.* v. *Martin* in a subsequent case, he might well have adopted the same explanation as did Cresswell J.

The decision in *R.* v. *Martin* has been applauded in an 1890 article by Mr. T. W. Brown,[17] as applying the dictates of justice and common sense, and as breaking with the old rule in cases like *R.* v. *Sheppard* (*ante*). It is submitted that the actual decision in *Martin* is sustainable on other grounds, *viz*: that there was no intent to defraud by the falsity of the instrument, and, as for cases like *Sheppard*, the prisoner still has the benefit of the answer of the jury to the question whether there was any intent to defraud, and normally, in such cases, it may be assumed that a properly-directed jury is unlikely to find the prisoner guilty of forgery. It is submitted that it is better to leave the accused who has signed in a fancy name to the mercy of the jury than to withdraw the case from the jury on the ground that the instrument is not a false one. As for *Martin's Case* itself, Cockburn C.J. surmised that Martin hoped to avoid liability on the cheque by using a false Christian name. This possibility should have been left to the jury, as, if this was proved to be the prisoner's intent, it would amount to an intent to defraud, an intent by the falsity of the instrument to deprive the prosecutor of his action on the cheque, though in law the false name would make no difference to Martin's civil liability.

There is one set of circumstances where signing in an assumed name is not forgery, and that is where the prisoner can prove that he was already known by this assumed name before making the document in question: *R.* v. *Bontien* (1818),[18] *R.* v. *Peacock* (1814),[19] though in a Texas case it has been held that the name must have had currency in commercial and not merely in family circles: *Ware* v. *The State* (1888).[20] This is still a good defence even though the name was originally assumed for fraudulent purposes, provided those purposes did not include the drawing of documents: *Peacock* (*ante*), *R.* v. *Whyte* (1851).[21] These cases are clear authority that no forgery is committed in such circumstances, but they do not explain whether this is because the instrument is not false, or because there is no intent to defraud.

To sum up, it appears that the following is the rule of law which

[17] 30 Am.L.R. 500, 510.
[18] R. & R. 260; 168 E.R. 791 (C.C.R.).
[19] R & R. 278; 168 E.R. 801 (C.C.R.).
[20] 65 S.W. 310.
[21] 5 Cox 290; 15 J P. 405.

can be deduced from the cases and is at the same time the most reasonable working rule:

To adopt an alias and to sign a document in that name is to make a false instrument. The intent to defraud thereby will be presumed, as a man is presumed to intend the natural consequences of his act, unless the prisoner can prove that the alias has been long adopted for business purposes, or the adoption appears to be without motive.

(2) *Passing off an otherwise true document by false representations dehors the instrument.*

Kenny remarks that to be false a document must tell a lie about itself.[22] At one time the law seems to have been that telling lies about a document was not forgery, as the document did not thereby become a false one. This is still good law, where the document does not, on its face, purport to be what the prisoner orally represented it to be: *R.* v. *Jones* (1779),[23] where Jones was acquitted on an indictment for uttering a forged note of the Bank of England. The prisoner represented the document to be a Bank of England note, but *ex facie* it was but an incomplete promissory note.

An early authority where the document does not belie the false representation is *R.* v. *Hevey* (1782).[24] Hevey was indicted for forging an indorsement to a bill of exchange for thirty pounds, and uttering it knowing it to be forged. The bill was in fact indorsed by one B. McCarty. Hevey represented to a pawnbroker that this was his own signature, and obtained from him a gold watch, value eighteen guineas, and eleven pounds two shillings in cash, in return for the bill. The question whether if a man produce the real signature of an existing person, and falsely declare that he is the identical person whose signature it purports to be, he is guilty of forgery was reserved for the consideration of eleven judges, who held for the prisoner, as the instrument was not a false one. Of course, had Hevey merely picked up this bill in the street already signed by McCarty, the latter being a respectable person, Hevey could not be guilty of forgery or of uttering a forged document because the document would not be a false one. But the case before the court was a strong one as Hevey, McCarty and Beatty, the acceptor, were forthwith indicted and convicted of conspiracy to defraud in issuing this bill. None of them was in fact good for thirty pounds, or, for that matter, thirty pence. The report does not explain how the fact that Hevey passed himself off as McCarty assisted in the fraud, or that this was part of the original scheme. The explanation no doubt lies in the fact that Hevey was an insolvent debtor unlawfully released from prison by the Gordon rioters, and probably anxious to preserve his incognito.

[22] 15th ed., 298.
[23] 1 Leach 204; 1 Doug. 204; 2 East P.C. 864; 168 E.R. 204.
[24] 1 Leach 229; 2 East P.C 856; 168 E R. 217 (C.C.R.).

A similar case to that of *Hevey* is *R.* v. *King* (1882).[25] King was indicted for forging the indorsement and acceptance to a bill of exchange, drawn and indorsed by Thomas Webb, and accepted by Samuel Knight, and also for uttering the bill. There was no clear evidence whether Webb and Knight actually existed, or who had signed the indorsement and acceptance, but Parke J., as Lord Wensleydale then was, directed the jury: "It may be a fraudulent transaction altogether; yet, if the signatures are those of persons actually in existence, though the bill may be false and fraudulent, still it cannot be said to be forged." The jury found King not guilty.

The proposition that misusing a document, which does not purport to be what it is not, does not constitute the crime of forging or uttering a false document also seems to be borne out by the case of *R.* v. *Smith* (1858).[26] Smith, finding it difficult to sell any other baking powder but Borwick's, had wrappers printed which were similar to those used to enclose Borwick's baking powder, except that the printed reproduction of Borwick's manuscript signature was omitted. Smith used these wrappers to wrap up his own baking powder, and fraudulently sold this as Borwick's. Smith was indicted for forging and uttering the wrappers, but his conviction was quashed by five judges. The court was doubtful whether such a wrapper was a document at all, but Mr. Turner gives his opinion,[27] which, with respect, seems to be the correct view, that the case was really decided on the point that the wrappers were not false. Bramwell B. remarked[28]: "One of these wrappers is as good as the other. The forged one does not assert anything which the other does not assert. The one is as true as the other, but one gets improperly used." This reasoning has been criticised by Professor Glanville Williams.[29] But the court does seem to acknowledge the principle that a document to be false must tell a lie about itself, and that false representations, oral or by conduct, cannot convert a true document into a false one. Whether the principle was mistakenly applied to the facts of the case is another matter.

The earliest and clearest case which involves a departure from the original rule that telling lies about a true document cannot render it false is that of *R.* v. *Mitchell* (1847).[30] Mitchell was indicted for uttering a forged acceptance to a bill of exchange. The acceptance purported to be that of J. Cooper, of Leeds. The bill had indeed been accepted by such a person, a stable hand, but Mitchell passed it off as the acceptance of a respectable Leeds merchant of the same name. Cresswell J. directed the jury that if Mitchell obtained the signature of Cooper, stable hand, intending to pass it

[25] 5 C. & P. 123; 172 E.R. 905.
[26] D. & B. 566; 27 L.J.M.C. 225; 169 E.R. 1122 (C.C.R.).
[27] 32 Va.L.R. 999, 952. Also in his 1950 edition of *Russell on Crime*, 1457.
[28] 27 L.J.M.C. 226.
[29] 11 M.L.R. 150, 158.
[30] 1 Den. 282; 169 E.R. 246.

off as that of Cooper, merchant, he was guilty of the offence charged, and the jury so found. Counsel for the Crown had argued that it was immaterial whether the stable hand was innocent or an accomplice,[31] but the court seems to have been satisfied that he was innocent, and the judgment seems to have proceeded on the footing that Mitchell was guilty of forgery by an innocent agent. Normally if a person does not make some part of the false document, he cannot be guilty of forging it, except as an accessory, but there is authority that forgery may be committed by the hand of an innocent agent.[32] In considering, however, whether a person is guilty of forgery through an innocent agent, the test is to regard the act of the agent as that of the prisoner himself. Putting the facts in *Mitchell's Case* as if the prisoner had signed "J. Cooper, Leeds" with his own hand, the signature would be genuine, as he had the authority of J. Cooper so to sign. The instrument is *ex facie* true. The only falsity is the intent at the time of making to pass off the signature as that of another person at a later date. If ultimately the prisoner does utter the instrument with such a false representation he will, at least in a case like *Mitchell's*, be guilty of obtaining by false pretences, and the overlap with forgery seems unnecessary. With the law as laid down in *Mitchell's Case*, he will be guilty of forgery even though he repents of his intention before uttering the document, and never in fact misuses it: *R.* v. *Elliott* (1777).[33] The case is an unsatisfactory one. No counsel appeared for the prisoner and new ground was broken, probably unconsciously.

Mitchell's Case was followed by the Irish Court for Crown Cases Reserved in *R.* v. *Mahony* (1854).[34] There Moore, the prosecutor, offered to give Mahony, his debtor, time to pay if he got his mother-in-law, Mrs. Watters, to join him in promissory notes for the amount due. Mahony got the notes executed by his wife, who signed in her

[31] If Cooper was an accomplice, it is by no means clear that in 1847 he was guilty of forgery. He merely signed his own name and address. It is submitted (*post*) that this was not making a false document until s. 1 (2) (*c*) of the Forgery Act, 1913, except in the case of the finder of lost documents who affixed his own signature. He, and Mitchell with him, should be acquitted of forgery, until 1913, if they are both in the plot to defraud.

[32] Kenny (15th ed., 900) illustrates the point from *R.* v. *Riley* [1896] 1 Q.B. 309, the case of the telegraph clerk who sent a telegram naming the winner of the 2.45 after the race had been run, and, by writing the time of dispatch as 2.40, induced the bookmaker to pay out. He was convicted of obtaining the money by a forged instrument. The transcript of the message, says Kenny, is made out by the hand of a purely innocent agent at the arrival office. But, with respect, this is a mere copy, and only secondary evidence of the original: *R.* v. *Regan*, 16 Cox 208. (See also s. 88, Indian Evidence Act, reversing this rule so far as India is concerned.) The original is in the prisoner's own hand and the question of forgery through an innocent agent does not arise. A better illustration is *R.* v. *Clifford* (1845) 2 C. & K. 202, where C was indicted for forging a receipt on a post office order payable to W.S. C wrote to B telling him to sign the receipt in the name of W.S., as the latter had given him (C) authority to do so. B, an innocent party, did so, obtained the money and sent it to C, who was held guilty of forgery by an innocent agent, as he had no authority from W.S.

[33] 1 Leach 175.

[34] 6 Cox 487.

maiden name "A. Watters." He then handed the notes to Moore, who believed them to be executed by the mother-in-law. At maturity the latter of course denied all knowledge of the notes. Her Christian name was in fact Catherine. Five judges confirmed the conviction of Mahony for forging and uttering the notes. It is submitted that the decision is an unfortunate one. Jackson J. remarks, at p. 498, that it is very common with humbler classes in the south of Ireland (where the notes were executed) to call a married woman by her maiden name. The note bore the actual signature of A. Watters and was not a false instrument. Yet the only point that really worried Monahan C.J., the trial judge, who reserved the case, was the difference in initials of the wife and mother-in-law. At p. 494 he seems to indicate that the offence may be forgery by an innocent agent. This would probably be so if it was a case of *non est factum*.[35] Otherwise the signature of the wife, if she had no intention to defraud, would be regarded as if it had been signed by the husband, and as he had her authority, there is the same doubt, as in *Mitchell's Case*, whether this was forgery in 1854. The position of the prisoner is, however, a little weaker than in *Mitchell's Case*. In *Mitchell* there was a real acceptor, an honest stable hand. In *Mahony* there is no co-drawer who will be liable on the bill, as a married woman could not be liable on a promissory note in 1854. In *Mitchell* the signature of a real person is passed off as that of another real person. The only disadvantage to the prosecutor is that the credit of the stable hand is inferior to that of the merchant. In *Mahony* the signature of a real person under legal disability is passed off as that of another real person under no such disability. Not merely has the actual signatory insufficient property to satisfy the claim of the prosecutor, but any property she may have is not legally bound.

Mitchell and *Mahony* were cases where it was held that it is forgery to pass off the signatures of real persons as those of other real persons. In *R.* v. *Nisbett* (1858),[36] Williams J. held that it was forgery to pass off the true signature of A as that of a fictitious person B. Nisbett was indicted for forging and uttering a bill of exchange. One count charged him with forging the name of the drawer. The signature of the drawer purported to be that of Robert Mitchell. Nisbett's defence was that his brother-in-law, Robert (or Richard) Mitchell, had given him authority to draw bills in his name. At the time of uttering, Nisbett passed off this signature as that of a clerk of that name holding a responsible and lucrative position at Nine Elms Station. Years before, Nisbett's brother-in-law had been employed there, but was a poor man. Williams J. directed the jury that if the prisoner represented the signatory as

[35] See Kenny, 15th ed., 301, but see *Collins* (1843) 2 M & Rob 461, 174 E.R 349, where C. induced an illiterate person to execute a deed of gift in his favour by misrepresenting it as a requisition to bring forward a Whig candidate, and Rolfe B directed the jury that this was not forgery.

[36] 6 Cox 320.

worth a thousand pounds, when in fact he was worth only ten shillings, this would not be passing off a bill as that of a fictitious person, and it was for the jury to decide whether Nisbett tendered the bill as that of a person who did not in fact exist, in which case it would be forgery. The jury found Nisbett guilty. According to this direction, therefore, a real person does not become fictitious merely because the prisoner gives him false attributes, and it is for the jury to say whether so false a character has been given to a real person that he has become fictitious. Presumably if I falsely tell the prosecutor that the drawer of a bill is not an infant, I am not tendering the bill as that of a fictitious person, and in *Mahony's Case* if the prisoner had merely represented that the signature of his wife was that of a *feme sole*, and had not further represented that it was the signature of another real person, his mother-in-law, he would not have been guilty of forgery.

The cases of *Mitchell*, *Mahony* and *Nisbett* appear to carry the law of forgery a step beyond the previous decisions, and to represent an unwarrantable extension of the law, but, although two of them are merely *nisi prius* decisions and the third an Irish case, their authority seems to be confirmed by section 1 (2) of the Forgery Act, 1918. In this subsection the first statutory definition of a false document is attempted. Most of the definition deals with undoubted cases of falsity, where a document purports to be what it is not, but in section 1 (2) (*c*) are these words:—

"In particular, a document is false:—

(c) if, though made in the name of an existing person, it is made by him or by his authority with the intention that it should pass as having been made by some person, real or fictitious, other than the person who made or authorised it."

These words are apt to include several cases where a document does not tell a lie about itself, but is falsified only by an intent to pass it off, by means of oral representations, as something that it is not. The case of *Nisbett* appears to fall within the ambit of the section. According to the finding of the jury, the bill was drawn by the prisoner in the name of an existing person, his brother-in-law, by his authority, with the intention on the part of the prisoner that it should pass as having been made by a fictitious person. The cases of *Mitchell* and *Mahony* are covered by the section, as in each case a document was made by the prisoner (by the hand of an innocent agent) in the name of an existing person, by the authority of that person, with the intention that it should pass as having been made by some real person other than the person who authorised it. It could be argued that the three cases are not within the section, that the intention to pass off the document must be that of the "existing person" whose name is misused, that the section was merely an attempt to enact the effect of such cases as *Mead* v. *Young*

(*post*) and *R.* v. *Parkes and Brown* (*post*), and it is not sufficient that the actual writer, the person with authority, has a fraudulent intention. Such an argument would require the words " of such existing person " to be read into the section after the word " intention," and even if this contention were to prevail, the prosecution could still fall back on section 85 of the Criminal Justice Act, 1925, which enacts that a document may be false, notwithstanding that it is not false in any such manner as is described in section 1 (2) of the Act of 1918. These three decisions seem, therefore, to be rooted in the law.

(8) *Signing one's own name.*

The question whether one who signs his own name to a document ever makes a false document seems first to have arisen, in the type of case where a document has, by chance (usually by loss or misdirection in the post), come into the hands of a person, who bears the same name as one of the contemplated parties to the document, and the receiver, though he realises the mistake, signs his name.

The point was first raised in a civil case decided by the Court of King's Bench in 1790: *Mead* v. *Young*.[37] This was an action by the indorsee of a bill of exchange against the acceptor. The bill was payable to Henry Davis or order. The bill fell into the hands of another Henry Davis, who indorsed it to the plaintiff, who discounted it. The court held by a majority of three judges to one that if Henry Davis made the indorsement with the knowledge that he was not the person to whom the bill had been made payable he was guilty of forgery, and therefore the plaintiff could not recover as he derived title under a forgery. Fifteen years later there was a criminal case before all the judges, but *Mead* v. *Young* was not cited, nor did Grose J., who was one of the court in both cases, recall it. This was *R.* v. *Story*.[38] Story asked at the post office if there were any letters *poste restante* for Story. The clerk by mistake gave him a letter addressed to Storer. This contained a money order, and to obtain payment Story signed his own name on the back. The court held that Story was not guilty of forgery.

In the recent case of *R.* v. *Hudson* (1943),[39] neither *Mead* v. *Young* nor *Story's Case* seems to have been cited. There the Ministry of Food wished to make payment to L. Hutson for pigs he had sold to them. They sent him by post a cheque in favour of Mr. Hudson. The letter was delivered to the prisoner, J. Hudson. He, realising the mistake, returned it to the Ministry for the insertion of his initial. When he received it back, he opened a bank account with it, indorsing it " J. Hudson " over a twopenny stamp on the back of the cheque below a receipt in these terms: " Received

[37] 4 T.R. 28; 100 E.R. 876.
[38] R. & R. 81; 168 E.R. 695 (C.C.R.).
[39] 29 C.A.R. 65; [1943] 1 All E.R. 642 (C.C.A.).

from the Ministry of Food the sum shown on the face hereof in settlement of fat stock purchased." He was convicted of forgery of the indorsement, and his conviction was upheld by the Court of Criminal Appeal. The only point on which the prisoner appealed was that there was no evidence that the indorsement was in his handwriting.

It is submitted that *Story's Case* would not now be followed. There was the additional fact, not present in *Mead* v. *Young*, that the name signed was not the name of the payee. How much this weighed with the court is not clear. Mr. T. W. Brown regards it as based on a finely drawn distinction, and prefers the case of *Mahony*,[40] where, as has been mentioned, Monahan C.J., although worried about the difference in initials between the actual signatory and the person as whose signature it was passed off, supported the conviction. There is also *R.* v. *Parke* (1848),[41] where the counsel for the prisoner admits that to be false the signature need not be an actual facsimile of the true one, provided it in fact deceives. *Story's Case* has been given little prominence in writings on forgery, as the conviction was for obtaining by false pretences. In Russell the finding on forgery is mentioned only incidentally in the chapter on false pretences. In Archbold it is ignored.

Mead v. *Young* is, on the other hand, well known to criminal lawyers though merely a civil case. It was cited to the Court of Exchequer Chamber in *R.* v. *Watts* (1822),[43] and in *R.* v. *White* (1847) [43] was approved by Parke B., as Lord Wensleydale then was, Pollock C.B., and Patteson J. Through incorporation in *Kenny's Cases on Criminal Law*, it has become known to generations of criminal law students. Its accuracy is finally established by section 1 (2) (*c*) of the Forgery Act, 1913.

The cases considered so far under this head have been instances of a genuine document falling into the wrong hands, and being put to fraudulent uses by those hands. What is the position where a document is conceived and brought forth in fraud, but all that the rogue does is to put his own signature to the document, intending to pass it off as the signature of some other person, real or fictitious? It was held in *R.* v. *Woodward* (1796) [42] by Grose J. that this was not forgery. The prisoner, a soldier, signed his own name as drawer to a bill of exchange for five guineas, payable to bearer, and obtained money on it by saying that he came from the sergeant major of the regiment. It is submitted that this decision is in accord with the old principle that to be false a document must tell a lie about itself, but this principle is ignored by section 1 (2) (*c*) of the Forgery Act, 1913, which clearly overrules this case.

[40] 80 Am L R 500, 502, note 8.
[41] 1 Cox 4.
[42] 6 Moo.C.P 442; R. & R. 486; 129 E.R. 1358 (Ex Ch.).
[43] 2 Cox 210, 213 (C.C.R.)
[44] Referred to in *R.* v. *Parkes and Brown*, 2 Leach 775, 782.

To return to the case of *Hevey* (*ante*), which was at one time regarded as an authority of the greatest significance,[45] it appears that there is today only one point on which the prisoner might escape conviction for forgery. If McCarty indorsed the bill intending that Hevey should pass off the signature as that of Hevey, he clearly falls within the ambit of section 1 (2) (*c*), and Hevey will be equally guilty as an accomplice. To escape, Hevey must therefore prove that it was no part of the original scheme that he should pass himself off as McCarty, and it was only at the time of uttering that he got cold feet, and, being afraid to indorse in his own name for fear of detection, determined to pretend he was McCarty.

Another case where under the old law it was no forgery to sign one's own name is illustrated by *R.* v. *White* (1847).[46] There the prisoner brought to the prosecutor a bill of exchange, drawn by M.C., payable to the drawer's own order, and indorsed by him, apparently in blank, saying falsely he came from one Tomlinson, whose servant he had in fact formerly been. The prosecutor remarked that Tomlinson had not indorsed the bill, and thereupon at the prisoner's direction wrote "*per* procuration T. Tomlinson" on the bill, and the prisoner signed his own name. The counsel for the prisoner admitted that the case must be considered as if the words "*per* procuration T. Tomlinson" had been written by the prisoner's own hand, but fifteen judges held that the offence was obtaining by false pretences and not forgery, there being no false making; the falsehood lay in the assertion of authority. This decision was soon overruled by section 24 of the Forgery Act, 1861.[47]

(4) *Writing a false address or description to a true signature.*

In two cases decided by the Court for Crown Cases Reserved, a distinction is drawn between adding the address or description of an existing person, and that of a fictitious person. If A signs his name, and B adds the address or description of another person of the same name, this is forgery if B knows of his existence, but otherwise not. In *R.* v. *Webb* (1819),[48] a bill of exchange purported to be signed by Thomas Bowden as acceptor, and Webb, who had drawn the bill, described him therein as a baize manufacturer of Romford. There was some evidence for Webb that one Thomas Bowden had indeed signed as acceptor, but he was not a baize manufacturer nor of Romford. The trial judge reserved the question whether, assuming these facts and an intent to defraud to be proved, Webb was guilty of forgery. Eleven judges decided that where there was no person answering the description there was no forgery. This distinction

[45] See for example the early editions of *Russell on Crime*, and note 53 (*post*).
[46] 2 Cox 210 (C.C.R.).
[47] Repealed, but now incorporated in s. 1 (2), F.A., 1913. In s. 24 it is provided that whosoever with intent to defraud shall draw, accept or indorse any bill of exchange by procuration or otherwise in the name of any other person without lawful authority or excuse shall be guilty of felony
[48] R. & R. 405; 129 E R. 1271 (C.C.R.).

was approved in *R.* v. *Blenkinsop* (1847).[49] Here B.'s servant, Wilkinson, who lived at Leeds, signed an acceptance on stamped paper that was blank except for some printed parts of a bill of exchange. B. completed the bill, addressing it to Wilkinson of Halifax. It was admitted that, at the time of making,[50] B. intended to pass off the bill as accepted by a Wilkinson of Halifax, who was known to him. Thirteen judges approved the distinction drawn in *Webb's Case* and upheld the conviction of B. for forgery.

In *R.* v. *Epps* (1864),[51] Willes J. refused to follow this distinction. Epps asked W whether he would discount a bill accepted by a Mr. Beard, seedsman, of Rottingdean, with whom he stated he had had dealings. After making inquiries, which must have been defective in some way as there was no such person, W agreed to do so. Epps got a servant of his called Beard, who lived at Maidstone, to write an acceptance on a blank bill stamp. Epps completed it, addressing it to George Beard, seedsman, Rottingdean. W then discounted it. The indictment was for forgery and uttering. Counsel for Epps naturally expected an acquittal, as there was no such person as Beard the seedsman. Willes J. robustly refused to admit that any such distinction had been drawn in the previous cases, and when pressed by counsel observed that it was impossible that it could have been so. This is a supreme example of judicial valour, a judge at *nisi prius* ignoring the opinion of twenty-four judges. It is submitted that the view of the puisne judge is the correct one. Section 1 (2) (*c*) of the Forgery Act, 1913, it is suggested, discards the distinction drawn in *Webb* and *Blenkinsop*, bearing in mind that there can be forgery by the hand of an innocent agent. The acceptance in *Webb's Case* was "made in the name of an existing person, . . . by his authority, with the intention that it should pass as having been made by some fictitious person, other than the person who . . . . authorised it." If Webb is regarded as having himself signed the name of Bowden with his authority, using him, that is, as an innocent agent[52] instead of getting him to sign, he makes a false document within section 1 (2) (*c*), if the construction of this subsection suggested above be adopted.

[49] 1 Den. 276; 17 L.J.M.C. 62; 2 C. & K 531; 2 Cox 420.

[50] The intent to pass off the signature as that of another real person must exist at the time of making. If the intent is conceived subsequently, the offence is, if anything, obtaining by false pretences, and not uttering a forged document, *R* v. *Watts* (1822) 6 Moo.C.P. 442 appears to be based on this principle. A bill was drawn on Williams and Co., bankers, Birchin Lane, London, by the prisoner, and nine days later he uttered it to P. with the false representation that the acceptors were London bankers, Williams, Burgess & Co., of 20 Birchin Lane, a real firm Eleven judges held this was not forgery or uttering. There was evidence that other bills drawn by the prisoner in the same month had been accepted by Swansea bankers, named Williams & Co., at 3 Birchin Lane, London. Semble this went far to establish the prisoner's good faith at the time of making.

[51] 4 F. & F. 81; 176 E R. 476.

[52] Of course, if Bowden was in the plot he makes a false document within s. 1 (2) (*c*), and Webb is guilty as an accomplice

Even in 1819 the case of *Webb* was difficult to distinguish from that of *R.* v. *Parkes and Brown* (1796).[53] There B. (Brown) authorised P. (Parkes) to sign B.'s name as drawer of a bill of exchange. The intention of both B. and P. was to defraud, by passing off the bill as drawn by B.'s brother, a fictitious person, and for this purpose the address of the drawer was written by P., who indeed wrote the entire bill except for certain printed parts, as "Ringhton, Salop." B. then uttered the bill to the prosecutor to obtain shoes, representing that it was drawn by his brother, an army captain, married to a wealthy woman. P. seems to have been the master mind in the conspiracy, judging from his letter of encouragement to B. after his arrest. The jury found P. guilty of forgery and B. of forgery and uttering. Twelve judges discharged P. on a procedural technicality, but affirmed the conviction of B. for uttering only. It was argued for the prisoners that it could not be forgery as P. signed B.'s name with B.'s consent, but it was held that B. of Ringhton, mentioned in the bill, had not consented, and, as he did not exist, could not consent. In *Webb's Case* the court distinguished *R.* v. *Parkes and Brown*, but the report does not state on what grounds. There is no material difference between the two cases if it is remembered that there may be forgery by the hand of an innocent agent. Webb signs Bowden's name with the consent of one Bowden, but not with the consent of Bowden of Romford. Similarly Parkes signs Brown's name with the consent of one Brown, but not with the consent of Brown of Ringhton. The only difference between the two cases may be stated in the following proposition:

He who signs the name of another with his authority to misuse his name and adds a fictitious address to represent a fictitious person makes a false document: *Parkes and Brown*, but he who induces an innocent person to sign his name and adds a fictitious address with the same intent does not make a false document: *Webb*.

This distinction is a tenuous one and involves the negation of the maxim *qui facit per alium facit per se*. There seems no good reason for holding it to be material whether the third party consents to the misuse of his name or not. In either case there is a signature which is *ex facie* true and a false address. The distinction does not seem to have survived section 1 (2) (*c*) of the Act of 1913.

In conclusion, it is noteworthy that all the changes in the law as to false documents under the heads here considered have been extensions of the idea, apart from the suspect decision in *R.* v. *Martin*. The passing of *R.* v. *Webb*, which is signalised by its omission from Archbold, will occasion no regret, as it seems proper that one who writes fictitious names or addresses to documents with intent to defraud should be amenable to the law of forgery. The conflict

[53] 2 Leach 775; 2 East 965; 168 E.R. 488 (C.C.R.). This case was considered by Russell in the earlier editions (see 2nd ed., 1854, Vol. 2, p. 826) to be inconsistent with *Hevey*, an illustration of the width of the principle originally believed to have been established in the latter case.

between *Mead* v. *Young* and *R.* v. *Story* seems to have been settled in favour of the former by section 1 (2) (*c*) of the Act of 1918, and no doubt in the right way. It is to be regretted, however, that the original principle that a document to be false must tell a lie about itself has been qualified by the statutory adoption of the unnecessary decision at *nisi prius* in *R.* v. *Mitchell*, the overruling of *R.* v. *Woodward*, and the eclipse of *R.* v. *Hevey*.

R. N. GOODERSON.[44]

[44] Fellow of St. Catharine's College, Cambridge; Lecturer in Law in the University of Cambridge.

DISCLAIMER OF CONTRACTS IN BANKRUPTCY

THERE are two provisions in the Bankruptcy Act, 1914, s. 54, by which outstanding contracts may be brought to an end or modified: one is the right of the trustee in bankruptcy to disclaim "unprofitable" contracts, and the other which may be regarded as complementary to disclaimer, is the right of a party who has dealt with a bankrupt to apply to the court to have a contract rescinded. It is only proposed to discuss disclaimer by the trustee in bankruptcy in this article, and further to limit the inquiry to three problems: first, the conflict between a claim for specific performance by the third party where the trustee wishes to disclaim; secondly, the question which arises where disclaimer is opposed on the ground that it will destroy a third party's security; and thirdly the effect of the trustee's failing to disclaim within the time limited by a notice served on him by the third party under section 54 (4).

The first two of these problems are each different aspects of the same generic conflict between the principle that a trustee shall respect existing rights and the policy that, in the administration of an insolvent estate, there should be a power to throw off onerous liabilities so as to prevent one creditor being paid in full where others have to be content with a dividend. Indeed, we can take this further and say that these questions resolve themselves into the distinction between what are often referred to as rights *in rem* and rights *in personam*, using those terms in the anglicised version as referring on the one hand to rights attaching to specific property, and, on the other hand to rights in the nature of personal obligations.

1. DISCLAIMER VERSUS SPECIFIC PERFORMANCE

Both disclaimer and specific performance are of limited application when applied to contracts, for the power of disclaiming contracts applies only to those which are "unprofitable," whilst an order for specific performance will not be granted in a number of instances, such as where the contract relates to a promise of a personal nature, or is such as cannot properly be supervised by the court in its performance. It seems, though there is little judicial guidance on the point, that the two classes of contract under each of the heads of disclaimer and specific performance are, as a rule, mutually exclusive. It is probably true to say that "unprofitable" means, not simply a contract which is a bad bargain, but one the performance of which cannot satisfactorily be carried out by

a trustee in bankruptcy. Thus, Collins L.J. in *Ex p. The Trustee, re Bastable* [1] said that a contract of sale was not included in the class of property to which disclaimer applied, the reason being that the intending purchaser had an equitable interest in the property the subject matter of the contract, and that disclaimer could not be used to destroy that right because of section 54 (2) of the Bankruptcy Act, 1914 (then section 55 (2) of the Bankruptcy Act, 1883) which lays down that disclaimer shall not affect the rights or liabilities of any other person; specific performance was, therefore, available against the trustee in such a case. On the other hand, in *Re Gough, Hanning* v. *Lowe* [2] it was held that a contract to build a house could be disclaimed. But specific performance of a contract under which the bankrupt agreed to *purchase* property cannot be had against the trustee in bankruptcy, since the necessary funds may not be conveniently available (*Holloway* v. *York*),[3] nevertheless if, in such a case, the trustee should disclaim, he cannot recover any deposit paid by the bankrupt (*Ex p. Burrell, re Parnell*).[4]

Some overlapping, however, does occur: disclaimable contracts, and specifically performable contracts are not mutually exclusive in all cases. There are two decisions, one concerning a contract to take a lease, and the other concerning a contract to build (already referred to) both of which are, it will be appreciated, contracts in respect of which specific performance may be granted in some circumstances, and the question arises whether a claim for specific performance overrides the power of disclaimer or vice versa.

In *Ex p. Monkhouse, re Maughan* [5] the bankrupt held certain property under a contract to take a lease. Shortly before the bankruptcy he had contracted to assign the residue of his term to a limited company (apparently formed by himself). The trustee in bankruptcy sought to disclaim the original contract between the bankrupt and the freeholder under which the bankrupt could call for a lease, and the proposed assignees of the residue of the term, the company, were willing for this to be done, and to waive their rights under their contract with the bankrupt. The lessor opposed the disclaimer (since it would put an end to the term), but he did not apply for an order for specific performance of the contract. The case was disposed of on the principle that, since a contract to take a lease is as good as a lease itself, the disclaimer might be allowed on the basis that the trustee was disclaiming "land burdened with onerous covenants" rather than an "unprofitable contract." This decision is, therefore, not of much

[1] [1901] 2 K.B. at 526.
[2] (1927) 96 L.J.Ch. 289.
[3] (1877) 25 W.R. 627.
[4] (1875) 10 Ch.App. 512
[5] (1885) 14 Q.B.D. 956.

help, except to say that this type of contract is not dealt with as a contract for the purpose of the question whether it is disclaimable.

As to the contract to build: in *Re Gough, Hanning* v. *Lowe* (*supra*) the bankrupt was a builder who had contracted with an owner of land to purchase certain plots of land, and he had also entered into a contract with the appellant to build her a house on one of the plots, and to convey the land with the house on it. The house had not been completed when the builder became bankrupt, and his trustee disclaimed the contract with the appellant. An order was sought by that lady that the contract was binding on the trustee. The first question was whether the promise to build could be separated from the promise to convey the plot of land, it being stated by the court that the contract to build could be disclaimed. The court held that the promises could not be severed, and therefore the appellant had the choice of either taking an assignment of the land, waiving her right to a building on it, in return for the full purchase money of £650 (being the price of the house-plus-land) or allowing the contract to be disclaimed. The first alternative was not accepted, and, of course, was not likely to be unless the house had at least been substantially completed. The next question arose from the fact that the appellant had paid a deposit of £105. As to this, it was conceded that she had a lien on such interest as the bankrupt had in the land, but of course, that interest was subject to the payment of the purchase money (of £126 10s.) due to the owner of the land (a lien obviously of little or no value as a means of getting back any part of the deposit of £105). Hence it was concluded that the trustee could disclaim without affecting the appellant's rights. This decision shows, at any rate, that a contract to build may be disclaimed, and, in view of the narrow application of the remedy of specific performance to building contracts, it probably establishes a rule of general application.

It is to be observed that in both these latter cases disclaimer was allowed; nevertheless it is to be concluded that in a clash between disclaimer and specific performance, it is the specific performance which usually succeeds. For in the first case, disclaimer was allowed only on the basis that it concerned, not a contract to which a remedy of specific performance was applicable, but land itself; whilst in the second case, disclaimer was allowed only after a careful scrutiny of the appellant's rights, and the conclusion that they would not be affected. For a case where the trustee was prevented from disclaiming a contract and specific performance was awarded against him see *Pearce* v. *Bastable*.[6] The fact that the building contract could be disclaimed in *Re Gough* (*supra*) is hardly an exception: it is the grant of an order of specific

[6] [1901] 2 Ch. 122.

performance (where there is no bankruptcy) that is exceptional in this type of contract.

2. CONTRACTS AS SECURITIES

Typical of the second problem is the hypothetical case put by Jessel M.R. in *Ex p. Walton, re Levy*[7] discussed both *arguendo* and in the judgment. It is a case very similar in its facts to *Brice* v. *Bannister*[8] though that case was not specifically alluded to. "Take the case," said his Lordship, "of a contract by a builder to build houses on another man's land, the landowner agreeing that on completion of the houses he will grant leases of them to the builder—a mere contract. The contract is pledged by the builder as security for his own debt . . . and afterwards the builder becomes a bankrupt. Is it to be supposed that the legislature ever contemplated that the equitable assignee of the contract should lose his security by the act of the trustee of the builder in disclaiming the contract?"

But we may ask whether there is any security here, at any rate after the builder has become bankrupt. The pledgee's right is a right to a charge on the leasehold interest of the builder, but it is an interest of a peculiar nature, since it is contingent on the happening of an event depending on the builder. It depends for its fruition on the completion of the contract by the builder, for until the houses are built the lease will not be granted, and so no capital sum can be realised. It may well be that the pledgee, in his contract with the builder, is granted a right to complete the houses if the builder fail to do so, and that right may be available to the pledgee against the landowner, but whether it will be available will depend on whether the contract is personal to the builder and not one which may be vicariously performed.

The matter does not end there, however, for the question then arises, to whom is the lease to be granted on completion of the houses in this manner? Specific performance will not be granted at the instance of the bankrupt,[9] but may possibly be granted in favour of the trustee, if he is willing to enter into the covenants required personally[10] though this point is not free from doubt.[11] But suppose the trustee is not so willing and he disclaims the contract, presumably the pledgee could apply for an order vesting in him the contract to build with its attendant right to claim a lease on completion of the houses, making any necessary provision for any interest which the bankrupt's estate may claim for work done. This, however, puts the pledgee in the position of an original lessee,

[7] (1881) 17 Ch.D. 746
[8] (1878) 3 Q.B.D. 569, C A
[9] *Willingham* v. *Joyce* (1796) 3 Ves. 168; *Buckland* v. *Hull* (1808) 8 Ves 92; *Neale* v. *McKenzie* (1837) 1 Keen 474
[10] *Powell* v. *Lloyd* (1827) 2 Y. & J. 872.
[11] *Weatherall* v. *Geering* (1806) 12 Ves 504

a position regarded by many as onerous, and one which he may not be willing to accept.

An alternative course which is available if the trustee has not disclaimed, is for the landowner to apply for rescission of the contract to build (under section 54 (5)); in such an application the court may rescind the contract " . . . on such terms as to payment by or to either party of damages for the non-performance of the contract, or otherwise as to the court may seem equitable . . . ". Although this speaks of payment " by or to the parties " and the pledgee is not a party (it is assumed) to the building contract, the ending phrase does not seem to be limited in that way. In practice the landowner and the pledgee could usually come to terms.

But suppose the trustee does disclaim, does that put an end to the contract altogether? Under the Bankruptcy Act, 1869, it was expressly enacted that a contract which was disclaimed should " be deemed to be determined " and it was, no doubt, against this expression that Jessel M.R.'s rhetoric was directed. But these words do not appear in the current Act, and therefore it is fair to assume that a disclaimed contract does not cease to exist altogether so as, for example, to prevent vicarious performance, especially in view of the provisions of section 54 (2) (*supra*).

There is, however, a separate danger to a security of this type to which the pledgee is prone to fall a victim on the bankruptcy of the contractor, and it may be as well to digress for a moment to point it out. It is this: suppose the trustee decide to complete the contract, carrying on the bankrupt's business for that purpose, what will be the nature of the pledgee's right on the completion of the work? It will be seen that this is a problem on the effectiveness of an assignment of the future profits of a business, and the answer is that such an assignment is not valid against a trustee in bankruptcy, the reason being that a trustee is not bound to carry on the business, and so, if he does, the profits are his, and not the bankrupt's; the right of the assignee-pledgee does not attach to them (*Ex p. Nicols, re Jones* [12]; *Wilmot* v. *Alton* [13]), and it is submitted, that (assuming these cases to be rightly decided) it makes no difference that in the above hypothetical case specific property, as distinct from a money sum, was involved. In *Wilmot* v. *Alton* (*supra*) the bankrupt was a theatrical costumier who pledged her contract to supply and repair the wardrobe for a production; it was held that this was not valid against the trustee as regards sums not due and payable to her at the time of the assignment. It may be added that this does not apply to sums due as personal earnings (in contrast to " business profits ") since a trustee has no control of personal earnings of a bankrupt (*King* v.

[12] (1883) 22 Ch.D. 782, C.A.
[13] [1897] 1 Q.B. 17.

Faraday Partners [14]) and the decision of *Re De Marney* [15] to the contrary must be regarded as bad law.

Such a security therefore, must be regarded as somewhat speculative.

8. NOTICE TO TRUSTEE IN BANKRUPTCY TO ELECT WHETHER TO DISCLAIM

The third problem concerns section 54 (4) of the Bankruptcy Act, 1914, which confers a right on any person interested in property which is disclaimable to serve a notice on the trustee requiring him to decide whether he will disclaim or not, giving him twenty-eight days for his decision. It is provided in this subsection that if he do not disclaim he shall, in the case of a contract, be deemed to have adopted it.

It has never been decided whether this makes the trustee in bankruptcy personally liable, or whether he becomes liable in a representative character on behalf of the estate and the creditors in a case where he fails to disclaim and so is deemed to have adopted the contract, but James L.J., said *arguendo* in *Ex p. Davis, re Sneezum* [16] that it seemed that the trustee would be liable "in his official character, *i.e.*, the estate becomes liable." This is important, of course, since although the trustee would be entitled to an indemnity from the estate if he were to be held personally liable, the estate might not be sufficient to meet that indemnity in full. In *Ex p. Davis, re Sneezum* (*supra*) it was held that a trustee may play fast and loose with contracts, abandoning them after he had performed them for a time, but that decision was based on the 1869 Act which did not contain the clause mentioned above to the effect that a trustee shall be deemed to have adopted a contract after failure to disclaim within the time limited when a notice has been served. There was a clause in that Act giving a right to serve such a notice, but this merely barred the right to disclaim and said nothing about adoption. Such a notice had been given in *Ex p. Davis* and the trustee had failed to disclaim within the time. Nevertheless at a later date, finding that he could not conveniently continue the performance of the contract (for the repair of railway wagons) he gave a notice of disclaimer. Although this could not operate as a disclaimer proper because of the provisions of the Act above, it could and did operate as a notice of intention to break the contract. The Court of Appeal held that this could be done, refusing to read into the 1869 Act the words "deemed to have adopted it" which are now in the present Act.

The point at issue is this: that if these words mean that the trustee is personally liable once he has failed to disclaim within the

[14] [1939] 2 K.B. 753.
[15] [1943] Ch. 126.
[16] (1876) 3 Ch.D. 463 at 469.

time limited by the notice, the aggrieved party will claim damages for breach of contract against the trustee personally instead of having to be content with a dividend in the estate, and even if the trustee's liability is not personal but in a representative capacity on behalf of the estate, it will then be contended that the aggrieved party is in the position of a secured, or first priority, creditor to be paid before all the other creditors. If these words "deemed to have adopted it" are to have any meaning it would seem that one of these possibilities is the only logical conclusion.

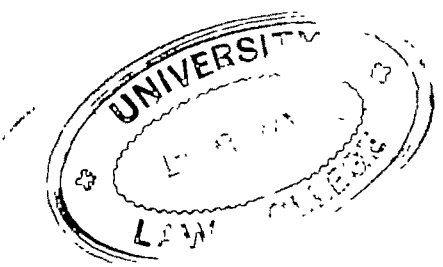
Summary

Where a contract is of such a nature that a right of specific performance against the trustee is available, disclaimer will be disallowed. There is no right to specific performance of a building contract against a trustee in bankruptcy nor of a contract under which the estate would be called on to pay a sum of money. A contract to take a lease may, however, be disclaimed since it is treated not as an unprofitable contract but as land burdened with onerous covenants.

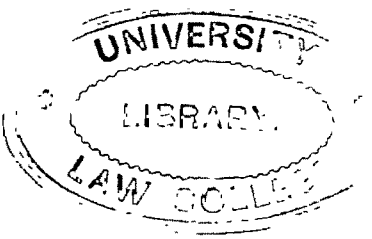
A contract which is pledged as a security may, no doubt, be vicariously performed by the party interested (subject to the nature of or provision in the contract) and this affords some protection to the pledgee in the case of bankruptcy of the pledgor, but if performance of the contract is by way of carrying on the bankrupt's business, and the trustee decide to do this, he may ignore the security as attaching to the proceeds or outcome of the contract, and the pledgee will be reduced to a non-secured creditor.

If there be a continuing contract and the third party calls on the trustee to elect whether he will disclaim or not, and he do not disclaim, it seems that the third party is then in the position of a secured or priority creditor as regards future performance, so that, on a breach, his damages must be paid in priority to any other creditor.

L. W. Melville.[17]



[17] Reader in Law at the Law Society's School of Law.



POLYGAMOUS MARRIAGES

RECENT decisions[1] on polygamous marriages present an opportunity for the re-examination of the problem of polygamy as it arises in the English courts. It will be submitted that,

(1) the concept of polygamy should be defined so as to include only those marriages where there is a *de facto* plurality of wives;

(2) the potentially polygamous character of the marriage should be determined by the *lex domicilii* of the husband.

The view usually accepted today is that the English courts will, for certain purposes, accord recognition to potentially polygamous marriages.[2] This attitude represents a recognition of the limited character of the judgment of Sir James Wilde (as he then was) in *Hyde* v. *Hyde*,[3] in which an Englishman petitioned for the dissolution of his marriage which had been contracted according to Mormon rites in Utah. His wife, whom he had left in Utah, when he returned to this country, divorced him according to Mormon rites and contracted a second Mormon marriage. Sir James Wilde refused to grant the relief sought, on the ground that a Mormon marriage was potentially polygamous, and that the matrimonial jurisdiction of the English courts only extended to Christian marriage, which he defined as "the voluntary union for life of one man and one woman to the exclusion of all others."[4] He thus assumed that the fact that the marriage was potentially polygamous was sufficient to take it out of the definition. Although the courts no longer interpret Sir James Wilde's judgment as meaning that no recognition at all can be accorded to a potentially polygamous marriage, they still apparently adhere to his view that a marriage is polygamous if it is merely potentially so.

Quite apart from other considerations it should be noted that the definition of marriage adopted by Sir James Wilde did not logically necessitate his treating Hyde's marriage as polygamous. So far as Hyde was concerned his marriage was a voluntary union of one man and one woman to the exclusion of all others, in that at the time of the proceedings, he was a *de facto* monogamist, and had been so throughout his married life. Further it may be pointed out that in treating Hyde's marriage as polygamous and refusing to grant it recognition, Sir James Wilde was ignoring the

[1] *Risk* v. *Risk* [1950] 2 All E.R. 978; *Maher* v. *Maher* [1951] P. 342.

[2] Cheshire, *Private International Law*, p. 404. Dicey, *Conflict of Laws* (6th ed.), p. 224. Schmitthoff, *English Conflict of Laws*, p. 292. Wolff, *Private International Law*, p. 325.

[3] (1866) L.R. 1 P. & D. 130.

[4] At p. 133.

fact that Canon Law, which had been administered by the Ecclesiastical Courts prior to 1857, and which by virtue of the Matrimonial Causes Act, 1857, s. 22,[5] he was obliged to follow, accorded recognition to the first of the wives of a polygamist.[6]

Quite apart from these considerations, however, it should be pointed out that Hyde's marriage was not in fact potentially polygamous. It was monogamous according to any system of law that could conceivably be applied to it. Mormon practices were not the law of Utah.[7] At the time of the proceedings Utah was not a State but a Territory, and as such the law applicable in Utah was U.S. Federal law. Thus if the law of Utah was applicable to the marriage either as the *lex loci celebrationis* or as the *lex domicilii* at the time of the celebration of the marriage, the marriage would have been monogamous, whilst if English law as the *lex domicilii* at the time of the proceedings applied, the marriage was obviously monogamous.

In the light of these considerations it is submitted that there is no good reason for relying on *Hyde* v. *Hyde*[8] as an authority on the definition of polygamy. It will be submitted that the recognition accorded to potentially polygamous marriages in more recent cases has logically necessitated the definition of polygamy as a marriage in which there is a *de facto* plurality of wives.

The fundamental problem in this connection is the meaning to be attached to the term "recognition." This term may mean either,

(1) That a potentially polygamous marriage is treated for some purposes as being equivalent to marriage in English law, or
(2) that a potentially polygamous marriage is accepted as a marriage according to English law.

It is clear that the former view is based on the assumption that monogamy and polygamy are distinct institutions, and not merely forms of the same institution—marriage. If they are considered as but forms of the same institution then it follows that marriage under a polygamous system would, by definition, be marriage under any other system, and from this it follows that the only logical meaning that can be given to the term "recognition" is that the potentially polygamous marriage is accepted as marriage in English law. Once this connotation of the term recognition is admitted it follows that there is no reason in either law or logic for distinguishing between a merely potentially polygamous marriage and a *de jure* monogamous marriage; both are "marriages," and whilst

[5] The section provides that "In all suits and proceedings other than proceedings to dissolve any marriage, the said court shall proceed and act and give relief on principles and rules which in the opinion of the said court shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief. . . ."

[6] Letter of Innocent III to the Bishop of Tiberias—Decretals IV, xix, 8; IV, xvii, 15. Quoted by Vesey-FitzGerald in 47 L.Q.R., p. 266.

[7] 2 Beale, *Conflict of Laws* (1935), 700, quoted in Falconbridge, *Conflict of Laws*, p. 654. Vesey-FitzGerald, 1948, *Current Legal Problems*, p. 227.

[8] *Supra.*

the potentially polygamous marriage remains *de facto* monogamous, both are unions of one man and one woman. It is submitted that the only rational justification for distinguishing between monogamy and polygamy is the fact that a purely monogamous system of law is not adapted to be applied *in toto* to a situation where there is a *de facto* plurality of wives, but unless and until there is a *de facto* plurality of wives there is not the slightest justification for the distinction.

We must therefore examine the justification, if any, for the view that monogamy and polygamy are distinct institutions, and then turn to examine the English cases in which recognition has been accorded to potentially polygamous marriages to ascertain whether they are consistent with the proposition that the marriages in question were recognised as marriages in English law.

Considering that "marriage" is an institution common to all legal systems, and considering that the institution whatever form it takes has for its object the regulation of the same aspects of social life it is rather surprising that monogamy and polygamy should be regarded as quite distinct, yet this is clearly the view taken by Martin Wolff. He states "not all the various kinds of marriage existing in different parts of the world are recognised as *marriages* by English law."[9] It is, however, difficult to see why the fact that the husband's personal law allows him the option of taking an additional wife if he so desires should be considered as affecting the essential nature of marriage, which is surely the same whether the marriage be monogamous or polygamous. In *Nachimson* v. *Nachimson*[10] the Court of Appeal rejected the argument that the nature of marriage could in any way be affected by the means available for its dissolution, on the ground that such an argument was confusing the incidents of the contract with its essence. It is submitted that in the same way it is confusing the incidents of the contract with its essence to argue that the nature of marriage can be in any way affected by the existence of the husband's right to additional wives, if he so desires.

We now turn to the cases in which the English courts accorded recognition to potentially polygamous marriages. The first two cases in which recognition was so accorded were peculiar in that in both cases the husbands belonged to sects of Hinduism which prescribed monogamy. In the *Sinha Peerage Claim*[11] a petition was presented by Lord Sinha's son praying for the issue of a writ of summons to the House of Lords. Lord Sinha had married a Hindu in India according to Hindu rites. After his marriage, but before the birth of his son, both he and Lady Sinha joined the Sadharan Brahmo Samaj sect, and Lord Sinha remained in fact a

[9] *Private International Law*, p. 320.
[10] [1930] P. 217.
[11] (1939) 171 Lords Journal 350; [1946] 1 All E.R. 348.

monogamist. Lord Maugham in giving the opinion of the Committee of Privileges in favour of the petitioner stated, "It cannot I think be doubted now (notwithstanding some earlier dicta by eminent judges) that a Hindu marriage between persons domiciled in India is recognised in our Courts."[12] In giving this opinion His Lordship also enunciated the definition of polygamy for which we are here contending. He stated "It is apparent that great difficulty may arise in cases relating to the descent of a dignity where the marriage from which heirship is alleged to result is one of a polygamous character, using the word polygamous as meaning *a marriage which did not forbid a plurality of wives and where there has been in fact a plurality of wives.*"[13] Further it is clear that one of the factors which influenced Lord Maugham was the *de facto* monogamous character of the marriage, for he said, "Hindu law as your lordships are well aware does not forbid a plurality of wives, but the marriage remained in fact a union between the late Lord Sinha and his said wife to the exclusion of any other spouse. *In other words it was so far as actual fact was concerned a monogamous marriage.*"[14]

In *Mehta* v. *Mehta*[15] the petitioner petitioned for the annulment of her marriage which had been celebrated in India with a domiciled Hindu, on the ground that she thought the ceremony was merely one converting her to Hinduism. The husband belonged to the Arya Samaj sect. Barnard J. assumed jurisdiction on the ground that although the marriage was a Hindu marriage, the fact that the husband belonged to a monogamous sect made the marriage a monogamous marriage. The opinion of an expert witness was to the effect that the husband could, by leaving the sect, regain his right to take additional wives, but regarding this point Barnard J. stated "It is perfectly clear that his marriage was monogamous in its inception and that monogamy was the essence of the contract into which these two parties entered: and I do not think that this Court can look beyond that."[16] Regarding the same point Lord Maugham in the *Sinha Peerage Claim*[17] stated "One of the main tenets of the sect is monogamy, and so long as the late Lord Sinha continued to be a member of the sect he could not contract a second marriage whilst his first wife was alive, which the Indian Courts would recognise as valid. It is no doubt true to say that Lord Sinha could have left the Sadharan Bhahmo Samaj at any time and would then have been at liberty to contract a second marriage during the life-time of his first wife, but it remains true that he never did leave the sect."

[12] At p. 849.
[13] *Ibid.*
[14] At p. 848.
[15] [1945] 2 All E.R. 691.
[16] At p. 693.
[17] (1939) 171 Lords Journal 350; [1946] 1 All E.R. 848.

It is respectfully submitted that it is not accurate to say that the husband could by leaving the sect *regain* his right of taking additional wives. In fact he could at any time have taken an additional wife irrespective of his membership of the sect, but having done so he would be excommunicated therefrom. In each case the husband was a Hindu, and as such governed by Hindu law which allows a plurality of wives. The fact that the husband was also a member of a monogamous sect was not a matter about which the courts had to concern themselves, for the tenets of the Sadharan Brâhmo Samaj and the Arya Samaj sects do not form part of the corpus of Hindu law. The position in these cases may be compared with the position of members of the Roman Catholic Church domiciled in England. The fact that the Roman Catholic Church does not allow divorce will not prevent a domiciled Roman Catholic from obtaining a divorce on any ground recognised by English law. It is thus submitted that membership of a monogamous sect does not affect the husbands right to take additional wives and that therefore the marriages in the *Sinha Peerage Claim* and in *Mehta* v. *Mehta* were potentially polygamous marriages, and yet they were treated in all respects as *de jure* monogamous marriages. It also follows from this that if the *de facto* character of the marriage at its inception is to determine its nature, then, there is no reason why all *de facto* monogamous marriages should not be treated as *de jure* monogamous, for all marriages whether potentially polygamous or not are monogamous in inception.

The next case in which recognition was granted to a potentially polygamous marriage was *Srinivasan* v. *Srinivasan*[18] in which an Englishwoman petitioned for the annulment of her marriage which had been celebrated in England with a Hindu domiciled in India, on the ground that at the time of the English ceremony her "husband" was already married to a Hindu woman, the marriage having been celebrated in India according to Hindu rites. Barnard J. expressly following the opinion of Lord Maugham in the *Sinha Peerage Claim* held that the Indian marriage was recognised in this country and that therefore the man was a married man at the time of the English ceremony and consequently incapable of contracting a valid marriage in this country. On similar facts in *Baindail* v. *Baindail*,[19] Barnard J. followed his own decision in *Srinivasan* v. *Srinivasan* and was upheld on appeal to the Court of Appeal.

In *Risk* v. *Risk*[20] where an Englishwoman petitioned for the annulment of her marriage which had been celebrated in Egypt with a domiciled Egyptian, on the ground that it was potentially polygamous, Barnard J. in refusing to exercise jurisdiction attempted to limit the effect of his former judgments in *Srinivasan* v. *Srinivasan*

[18] [1946] P. 67.
[19] [1946] P. 122.
[20] [1950] 2 All E.R. 973.

and *Baindail* v. *Baindail* when he said that all that those cases decided was that "a man who was domiciled in a country which permitted polygamy and had contracted a valid polygamous marriage in that country had the status of a married man according to the law of his domicil and was therefore incapable of contracting a subsequent valid marriage in this country."[21] It is respectfully submitted that his interpretation was neither necessary nor justified. There is no suggestion in either of the judgments that the marriages were being recognised as anything other than as marriages in English law.

In *Srinivasan* v. *Srinivasan* Barnard J. said[22]: "I have come to the conclusion that the textbook view is wrong and relying as I do on the above passage from Lord Maugham's speech, *I ought to recognise this Hindu marriage as a valid marriage,*" whilst in *Baindail* v. *Baindail* Lord Greene, after concluding that the respondent was a married man according to Hindu law, said[23]: "On principle it seems to me that the courts are bound to recognise the Indian marriage *as a valid marriage* and as an effective bar to any subsequent marriage in this country." Indeed in those cases they could not logically have been accorded recognition on any other basis. The bar to marriage in this country arises if either party is already married according to English law. There is no evidence that the bar to marriage arises because one of the parties has formed a union that does not amount to marriage so far as English law is concerned.

Further, since *Risk* v. *Risk*[24] was a case in which matrimonial relief was sought from the marriage, the limitation of the previous judgments was in no way necessary for the decision, for in *Srinivasan* v. *Srinivasan*[25] Barnard J. expressly purported to exclude matrimonial relief from the sphere of recognition. It is further submitted that, in any case, the exclusion of matrimonial relief from the sphere of recognition was, so far as *Srinivasan* v. *Srinivasan* was concerned, illogical, since in both that case and *Baindail* v. *Baindail* Barnard J. in fact gave matrimonial relief to the *second* "wife" of a polygamist. We therefore submit that despite the decision in *Risk* v. *Risk* the recognition accorded to potentially polygamous marriages is recognition as marriages in English law and this being so we submit that, as we have already pointed out, the definition of polygamy should logically be such as to exclude *de facto* monogamous marriages and only include marriages "which do not forbid a plurality of wives and where there has been in fact a plurality of wives."

[21] At p. 974.
[22] *Supra*, at p. 69.
[23] *Supra*, at p. 190.
[24] *Supra*, note 20.
[25] At p. 68.

LAW DETERMINING THE NATURE OF THE MARRIAGE

THE other fundamental question which arises in connection with potentially polygamous marriages is the question as to which law determines the nature of the marriage. Two answers are usually put forward :—

(1) the *lex loci celebrationis*,

(2) the *lex domicilii*.

Although the *lex loci celebrationis* is the solution which seems to find most favour in this country,[26] it is difficult to justify its authority. The function of the *lex loci celebrationis* in relation to marriage is the determination of the form of the ceremony.[27] The rights and duties of the parties as married persons adhere to status, and it is surely a firmly established rule of Private International Law that status is determined by the *lex domicilii* of the parties concerned,[28] and therefore it would seem logically to follow that the existence of the husband's right to take an additional wife if he so desires should be determined by the husband's *lex domicilii*.

Becket has pointed out that the determination of the applicable law depends upon whether monogamy and polygamy are regarded as distinct institutions or not. Thus he states[29] "The first of these views (*i.e.*, that the *lex domicilii* applies) proceeds on the assumption that there is but one institution—'marriage'—which includes both monogamous and polygamous marriage. The *lex loci celebrationis* only governs the form of the marriage." Later he states "The alternative view is that polygamous marriage although it shares the name marriage and has many results and incidents in common with monogamous marriage, is an entirely different institution, so different that it is necessary to have regard to the actual ceremony and the *lex loci contractus* not merely to ascertain whether there was a marriage, but also which kind of marriage it was." We have already indicated our reasons for believing that there is no justification for the view that monogamy and polygamy are distinct institutions and we therefore turn to see whether the view that the *lex domicilii* applies is consistent with the English decisions. A number of decisions are cited as being inconsistent with this proposition and these decisions we will now examine.

The first such decision was in *Re Bethell*[30] which was a claim on behalf of the infant son of an Englishman who had "married" a woman of the Baralong tribe of Bechuanaland. The court on finding that a Baralong marriage was potentially polygamous held

[26] Wolff, *Private International Law*, p. 324; Schmitthoff, *Conflict of Laws*, p. 291; Graveson, *The Conflict of Laws*, p. 99; Dicey, *Conflict of Laws* (6th ed.), p. 226.
[27] Cheshire, *Private International Law*, p. 411.
[28] *Re Luck* [1940] Ch. 864.
[29] 48 L.Q.R., p. 352 and p. 356.
[30] (1887) 38 Ch.D. 220.

that it did not constitute a valid marriage from the point of view of the English courts. Since Bethell apparently retained his English domicile throughout, the argument put forward is that the only law that could have made his marriage potentially polygamous was the *lex loci celebrationis*.

It is respectfully submitted that there was no valid marriage at all in this case for the very simple reason that Bethell never intended to contract a marriage in any sense of the term. As the court pointed out Bethell's refusal to be married by an English clergyman who was willing to perform the ceremony, despite the fact that the "bride's" father urged him to do so, was evidence of his lack of intention, and the fact that he kept his "marriage" secret from his English relatives and never introduced or spoke of the woman as his wife lent support to this view, as did the fact that he made special provisions for the maintenance and education of any offspring of the union, whilst under his father's will any legitimate child of his would succeed to the property from which he was receiving an income of £600 p.a. It should further be pointed out that in any case even assuming he had the necessary intention, the marriage would not have been potentially polygamous, even if the *lex loci celebrationis* were the applicable law, for the *lex loci* of Bechuanaland was not Baralong tribal custom, but was in fact Roman-Dutch law [31] as modified by British legislation. From this fact it also follows that the marriage was invalid on the ground that it was not celebrated in accordance with the *lex loci celebrationis*. Baralong custom was retained for the benefit of the native tribes, not for the benefit of the Europeans. Bethell was not a Baralong and no amount of assertion on his part could make him one. Therefore we may conclude that there was no marriage at all in *Re Bethell*, and therefore the decision presents no obstacle to the view that the *lex domicilii* determines the nature of the marriage.

The decision, however, has been defended on the ground that since Bethell was domiciled in England he had no capacity to contract a polygamous marriage.[32] It is respectfully submitted that it is misleading to talk of capacity to contract a potentially polygamous marriage as being distinct from capacity to contract a monogamous marriage. It is clear that such an attitude is based on the assumption that monogamy and polygamy are distinct institutions, a view which we have already tried to show is no longer justifiable. Once it is admitted that monogamy and polygamy are but forms of the same institution it logically follows that if a person has by his or her personal law capacity to marry at all then he or she may marry anyone, whether their personal law permits polygamy or not.

[31] *Keith's Constitutional Law* (6th ed.), p. 581.
[32] Cheshire, *Private International Law*, p. 408.

It may further be pointed out that to attempt to reconcile the decision in *Re Bethell* with the proposition that the *lex domicilii* determines the nature of the marriage is rather illogical, for if Bethell was domiciled in England, then if his *lex domicilii* governed the nature of the marriage the logical conclusion is that this marriage would have been—apart from the considerations mentioned above—a valid *monogamous* marriage. It is, of course, perfectly true that a domiciled Englishman cannot contract a potentially polygamous marriage, because other things being valid, any marriage that he contracts will by the application of his personal law be monogamous. To argue that his attempt to contract a potentially polygamous marriage is invalid presupposes that some factor other than his personal law makes the marriage potentially polygamous.

One of the consequences of the view that the *lex domicilii* determines the nature of the marriage is that the marriage of a man whose personal law permits polygamy will be potentially polygamous wherever it is celebrated, and this it is said is contrary to the decisions in *Chetti* v. *Chetti*[33] and *The Hammersmith Marriage Case*.[34]

In *Chetti* v. *Chetti*, a Hindu domiciled in India married in London a domiciled Englishwoman. She claimed judicial separation on the ground of cruelty. The court granted the relief sought. It is therefore argued that, since the court were prepared to assume jurisdiction over the marriage it could not have been a potentially polygamous marriage, and it could only be so regarded on the basis that the *lex loci celebrationis* determined the nature of the marriage. In fact the point of the possible polygamous character of the marriage was hardly discussed in the case. The main point argued, apart from the question of capacity, was whether jurisdiction in the case of judicial separation could be exercised on the basis of residence alone, and Sir Gorell Barnes stated[35] "Suppose the man met the woman in the street here and began knocking her about, this court would afford her protection. That principle was decided in *Armytage* v. *Armytage*,[36] where although this court could not have granted a divorce it gave the wife the protection she needed." It is respectfully submitted that just as domicile is not necessarily relevant to questions of judicial separation so the polygamous nature of the marriage is not necessarily relevant, and the fact that the point was hardly raised during the case is evidence that the court equally regarded it as irrelevant. Thus it is submitted that the fact that the court granted matrimonial relief in *Chetti* v. *Chetti*[37] in no way commits English law

[33] [1909] P. 67.
[34] *R.* v. *Superintendent Registrar of Marriages for Hammersmith, ex p. Mir-Anwaruddin* [1917] 1 K.B. 634.
[35] At p. 72
[36] [1898] P. 178.
[37] *Supra*, note 32.

to the view that the *lex loci celebrationis* determines the nature of the marriage.

In the *Hammersmith Marriage Case*, the petitioner, a Moslem domiciled in India, married at an English Registry Office a domiciled Englishwoman. After having been deserted by his wife he purported to dissolve the marriage by *talaq*. On his desiring to remarry the registrar refused to issue a licence, on the ground that he was still a married man. He applied for a writ of mandamus and on that application the issue was tried. The court refused the application, holding that the declaration of *talaq* was ineffective to dissolve his marriage. It would appear from the judgments delivered that the decision was based on two grounds. First, that the English courts would only recognise a divorce effected by means of a judicial decree, second, that the marriage having been celebrated in England was a monogamous marriage, and could not therefore be dissolved by a method of dissolution pertaining solely to a polygamous system of law.

The first ground appears clearly in the judgment of Lord Reading C.J. who stated [38] "Neither authority nor principle can be found in English law to establish the proposition that a marriage contracted in England is dissolved according to the law of England by mere operation of the laws of the religion of the husband and without a decree of a court of law." The judgment of Bray J. is to the same effect. This ground of the decision has been severely criticised by Cheshire [39] and we may agree with his criticism. It places a quite unnecessary limitation on the principle that dissolution of marriage is a matter pertaining to the *lex domicilii* of the parties at the time of the proceedings. If the *lex domicilii* allows divorce without judicial intervention, then it is not for the English Courts to refuse recognition of the divorce on that ground. It should, however, be pointed out that this basis of the decision presents no obstacle to the view that the *lex domicilii* determines the nature of the marriage, as it says nothing whatever regarding the nature of the marriage being dissolved.

The alternative ground of the decision, however, does present an obstacle to that view in that it is necessary to conclude that the marriage was a monogamous marriage. It is, however, respectfully submitted that this ground also places an unnecessary limitation on the firmly established principle that dissolution of marriage is a matter pertaining to the *lex domicilii* of the parties at the time of the dissolution proceedings. Further, it is clear that such an argument is again based on the assumption that monogamy and polygamy are distinct institutions, a view which we have already indicated is no longer justifiable. There is, however, a third ground on which the decision may be defended. It may be

[38] [1917] 1 K.B. 634, at p. 642.
[39] *Private International Law*, p. 485.

argued that the declaration of *talaq* was ineffective not because the marriage it purported to dissolve was celebrated in this country, but because it itself was pronounced in this country. By analogy with the rule that the formalities of marriage must conform with the *lex loci celebrationis* we may perhaps say that the formalities of divorce must conform with the *lex loci dissolutionis*. According to the accepted principles of Private International Law the *locus* of divorce must be the domicile of the parties, and therefore it may be argued that the *talaq* to be effective should have been pronounced in the domicile of the parties, *i.e.*, India.

If this interpretation is accepted it follows that we must regard *Maher* v. *Maher*[40] as being wrongly decided. In that case a marriage was celebrated at an English Registry Office between a domiciled Egyptian and a domiciled Englishwoman. The husband deserted his wife and on his return to Egypt he divorced his wife by *talaq*, the *talaqnamma* being delivered to the wife by the Egyptian Embassy in this country. Barnard J. following the *Hammersmith Marriage Case*[41] held the pronouncement ineffective to dissolve the marriage. Since, however, the divorce was pronounced in accordance with the *lex loci dissolutionis* the *locus* being the domicile of the parties, it is submitted that the pronouncement of *talaq* should have been recognised as a valid and effective divorce by the English court.[42]

Another argument raised against the authority of the *lex domicilii* is based on *R.* v. *Naguib*[43] in which a Moslem domiciled in Egypt was prosecuted for bigamy. He contended that he had married an Egyptian lady in Egypt according to Mohammedan rites in 1898. He subsequently came to England and married a domiciled Englishwoman. In 1918 he purported to divorce his Egyptian wife and married a second domiciled Englishwoman. On prosecution for bigamy in respect of his second English marriage, his plea that his first English marriage was invalid by reason of the existence of his Egyptian marriage was rejected on the ground that he had not sufficiently proved the existence of his Egyptian marriage, and he was convicted. The point, however, is raised that if the *lex domicilii* were held to apply to determine the nature of the marriage, prosecutions for bigamy would be impossible in such cases as the husband would have under his personal law a perfect right to take additional wives. Cheshire indeed concludes that such is the logical conclusion of the application of the *lex domicilii*.[44] With respect it is submitted that the application of

[40] [1951] P. 342.
[41] *Supra.*
[42] The *locus actus* of the *talaq* being Egypt—the country in which it was pronounced. The fact that the *talaqnamma* was received by the wife in this country cannot affect the position, for the divorce is actually effected by the pronouncement of the *talaq*, a *talaqnamma* not being necessary to its validity.
[43] [1917] 1 K.B. 359.
[44] *Private International Law*, p. 414.

the *lex domicilii* does not lead to any such conclusion. The argument to the contrary is based on a failure to distinguish between the existence of the right to take additional wives, and the exercise of that right in this country. The ceremonies of marriage in England are only available to unmarried men, and any person who being married, whether his personal law be polygamous or not, goes through a ceremony of marriage in this country can always be prosecuted for bigamy for the simple reason that the Offences against the Person Act, 1861, s. 57, provides that the offence of bigamy arises whenever a person "who being married, marries any other person during the life of his or her wife or husband." Thus we conclude that the conviction of Naguib for bigamy gives no support to the contention that the *lex loci celebrationis* determines the nature of the marriage.

One final argument against the authority of the *lex domicilii* is that it leads to the conclusion that a Hindu or Moslem who marries in this country has on his return to a country whose laws recognise polygamy a perfect right to take additional wives since the right to take additional wives is one of the incidents of status, and will therefore vary as the *lex domicilii* varies. This conclusion has been disputed on the ground that a person who celebrates his marriage according to the forms of a monogamous system of law is thereafter debarred from taking additional wives on the ground that he has thereby contracted out of the further exercise of his right to take additional wives. Thus in *Lendrum* v. *Chakavarti*,[45] Lord Mackay said that he saw "no juridical difficulty in the concept that a party may by contract debar himself from exercising liberties allowed to him by his personal law." One may agree that there is no juridical difficulty as to the concept, but surely it is difficult to say that any of the forms of marriage permitted by English law amount to a monogamous contract prohibiting a person from the future exercise of the rights allowed to him by his personal law.

There is, however, one limitation on the conclusion that the *lex domicilii* governs the nature of the marriage, provided by the wording of the Offences against the Person Act, 1861, s. 57, which provides that a second marriage will be bigamous whether celebrated in England "or elsewhere" with an exception in the case where the second marriage is celebrated "elsewhere than in England or Ireland by anyone other than a British subject." This section would seem to mean that any British subject, whether his personal law permits polygamy or not, will be guilty of bigamy according to English law, if he contracts a second marriage anywhere in the world. It is evident that the attitude of the criminal law towards polygamy requires fuller investigation than can be undertaken here, but it is clear that this limitation does not apply to

[45] 1929 S.L.T. 96.

non-British subjects who contract their second marriages elsewhere than in England, and their right to take additional wives, whether their first marriages were contracted in England or not is surely indisputable if the proposition that the *lex domicilii* governs the nature of the marriage be accepted.

There remains, in support of the *lex domicilii*, the isolated dictum of Lord Brougham in *Warrender* v. *Warrender*,[46] who stated "An Englishman marrying in Turkey contracts a marriage of the English kind, that is excluding a plurality of wives, because he is an Englishman and only residing in Turkey and under the Mohammedan law only temporarily and accidentally." In conclusion it is submitted that English law is not irrevocably committed to the view that the *lex loci celebrationis* governs the nature of the marriage, in that this conclusion is not necessarily supported by the cases usually invoked in its support, and therefore we submit that it is open to the English courts to pronounce in favour of the *lex domicilii*, the application of which is far more consistent with the principles of Private International Law.

G. W. BARTHOLOMEW.[47]

[46] *Warrender* v. *Warrender* (1835) 2 Cl. & F. 488.

[47] Assistant Lecturer in Islamic Law at the School of Oriental and African Studies, University of London.

THE EFFECT OF LIQUIDATION ON CONTRACTS OF SERVICE

THERE appears to be very considerable doubt as to the exact effect of liquidation upon a contract of service between a company and its employee. In particular the effect of a resolution to wind up voluntarily is obscure and the cases as a whole are not easy to reconcile. It is submitted, however, that if they are examined together a principle can be deduced which will explain all the decisions and will indicate the true effect of a resolution to wind up voluntarily.

Re General Rolling Stock Co. Ltd. (Chapman's Case) [1] is the earliest case and was concerned with a winding-up order under the Companies Act, 1862. Romilly M.R. in a short judgment said:—

> "The Winding-up Order . . . is notice to all the world of the winding up. The applicant will be entitled to prove for his salary on the footing of having had notice of discharge on the day the order was made."

It will be observed that the crucial date was stated to be the date of the order and not the commencement of the winding up.

Re English Joint Stock Bank, Ltd. (Ex p. Harding) [2] was not dissimilar, but in this case a winding-up order was made on May 27, proceedings under it were stayed, a supervision order was made on July 31, and the liquidator gave notice to the servant on August 1. The servant claimed three months' salary in lieu of notice as from August 1 and the question arose whether the order of May 27 had amounted to notice to the servant. Page-Wood V.-C. (as he then was) said, firstly, that if the business did not continue and there was nothing for the clerks to do

> ". . . if the clerks receive notice at or shortly after the making of the winding-up order . . . the discharge may be held to date from the making of the order,"

and secondly, that if the company continued in business so that there was work to occupy the clerks they must continue under the old contract. Thus, even in the first case the judge envisaged some notice other than the winding-up order itself and in the second case allowed the winding-up order no effect at all. In the light of subsequent decisions neither of these propositions will stand.

In *Re Imperial Wine Company (Shirreff's Case)* [3] no authorities were quoted and Romilly M.R., without giving any reasons, said:—

> "I am of the opinion that the resolution to wind up the company *ipso facto* put an end to Mr. Shirreff's employment and was equal to his dismissal."

[1] L.R. 1 Eq. 346.
[2] L.R. 3 Eq. 341.
[3] L.R. 14 Eq. 417.

This was the first case in which the effect of voluntary winding up was considered, and since the question was never argued the case is of little authority.[4]

Re Oriental Bank Corporation (*Macdowell's Case*) [5] was a case of compulsory winding up. The servant was entitled by his contract of service to three months' notice: a petition for winding up was presented and a provisional liquidator appointed on May 8. The provisional liquidator gave notice to the servants that, whilst retaining his right of instant dismissal, he would give what notice he could. A winding-up order was made on May 19, and the applicant continued to assist the liquidator until August 19 when he was given notice that his services would not be required after August 31. He claimed for three months' salary as from August 19. Chitty J. followed *Chapman's Case* [6] as an authority for the rule that a winding-up order is notice to all employees and distinguished *Ex p. Harding* [7] on the grounds that in that case the business as such had been continued whilst in the case before him the liquidator had retained the services of the clerk purely to assist in the process of winding up. The learned judge suggested [8] that in all cases it was open to the liquidator and the employee to agree to waive the notice of the winding-up order and continue on the terms of the old employment but found that this had not been done in the case before him.

Reid v. *Explosives Co., Ltd.* [9] was concerned with the appointment of a receiver and manager by debenture holders, and it was held that, on the facts of the case at any rate, the appointment terminated the employment of the company's servants. Esher M.R. at p. 267 argues that an employer who shuts up his business *ipso facto* dismisses his servants, and so the fact of a mortgagee taking possession must have the same effect since it occurs by default of the mortgagor: he then proceeds on the ground that this position is not altered where a receiver and manager is appointed by several mortgagees. Something more will be said about this reasoning later. Fry L.J. whilst concurring in the decision was of the opinion that all depended on the facts of each case and he says [10]:

> "I am not prepared to lay down that every entry by a mortgagee is a dismissal of the servants of the mortgagee from his employment. I think that to see if this has happened we should look at the facts of each case, but in the present case I think the facts show that the entry did determine . . . and was a dismissal."

[4] See Warrington J. in *Midland Counties and District Bank, Ltd.* v. *Attwood* [1905] 1 Ch. 357, 368; *infra*, p. 50.
[5] 32 Ch. 366.
[6] *Supra.*
[7] *Supra.*
[8] At p. 369.
[9] 19 Q.B. 264.
[10] At p. 269.

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Thus the headnote to this case stating that the appointment of a receiver does determine contracts of service is only supported by the judgment if one is prepared to accept Lord Esher's opinion and reject that of Fry L.J., and, as will be shown below, Lord Esher's reasoning is open to question.

In *Midland Counties District Bank, Ltd.* v. *Attwood* [11] the point arose whether a resolution for voluntary winding up operated *ipso facto* as a discharge of the servants of the company. Warrington J. accepted that an order for compulsory liquidation put an end to the contract of employment but also accepted the argument that such termination was not brought about by the resultant change in the nature of the business carried on (which in view of *Turner* v. *Sowden & Co.*[12] is an untenable position) but rather by a change in the personality of the employer. The judge took the view that in a compulsory liquidation the business was carried on by the court with the assistance of the liquidator, who is its officer, whilst in a voluntary liquidation the assets remain in the control of the company being administered by its agent the liquidator. On these grounds, and ignoring *Sherriff's Case* [13] since the point had there been assumed and not argued, it was held that a resolution for voluntary winding up did not *ipso facto* operate as a dismissal.

The last mentioned decision came under criticism in *Reigate* v. *Union Manufacturing Co., Ltd.*[14] Scrutton L.J. said [15] that in neither compulsory nor voluntary liquidation is there any change in the personality of the company until it is dissolved; what happens is that a different person is managing the affairs of the company, in one case he is appointed by the court and in the other case by the company. On the same page Scrutton L.J. suggested that a resolution for voluntary winding up may, or may not, be a discharge of the servants according to the facts of the case. Pickford L.J. suggested [16] that on the facts of the case before him the company, by going into voluntary liquidation, had intimated to the other party to the agreement that they no longer had any intention of carrying out the contract.

In *Re Etic, Ltd.*[17] Maugham J. (as he then was) considered the question whether or not voluntary liquidation terminated contracts of service to be an open one.

In *Fowler* v. *Commercial Timber Co., Ltd.*[18] it was not necessary to determine the point since the liquidators gave notice of dismissal on the day that the resolution was passed. Greer L.J. in a dictum [19]

[11] [1905] 1 Ch. 857.
[12] [1901] 2 K.B. 653.
[13] *Supra.*
[14] [1918] 1 K.B. 592.
[15] At p. 606.
[16] At p. 601.
[17] [1928] Ch 861, at p. 862.
[18] [1930] 2 K.B. 1.
[19] At p. 6.

thought that a resolution to wind up voluntarily must amount to dismissal where that resolution depends upon the company being unable to meet its obligations.

Similarly in *Re Farrar, Ltd.*[20] it was unnecessary to decide the point as the liquidators, on appointment, " forthwith dispensed with the services of Mr. Jell."

There can be no doubt as to the position of the company's servants in the case of a compulsory winding-up order. That order operates as an immediate dismissal to take effect, not from the commencement of the winding up, but from the date of the order. It is open to the servant and the liquidator to agree to waive the notice, and if this is done their agreement will have the effect of a new contract between employee and liquidator upon the terms, as to remuneration, notice, etc., of the old contract between employee and company. Alternatively it is open to the servant and the liquidator to agree that the servant shall remain in the employment of the liquidator on any other terms that may be agreed, for instance on the terms that the employee shall have the same remuneration as before but shall be subject to instant dismissal as was the case in *Macdowell's Case.*[21] Any apparent conflict between that case and *Ex p. Harding* [22] can be explained on the ground that in the earlier case an agreement of the first type could be implied from the facts and in the later case it could not. Chitty J. distinguished *Ex p. Harding* [23] on the ground that there the business was continued and in the case before him it was not. It is submitted that the continuance of the business is not of itself decisive but is a factor to be considered when determining whether or not an agreement of the first kind has been concluded between liquidator and employee.

Whilst there is no question that an order for compulsory winding up operates as an instant dismissal it is necessary to consider why it should do so. In *Ex p. Harding* [23] and in *Macdowell's Case* [21] it would seem to be suggested that the basis is the change in the nature of the business carried on. That ground was rejected in *Attwood's Case,*[22] and in the light of *Turner* v. *Sowden & Co., Ltd.,*[24] where it was held that a complete cessation of business did not terminate a contract of service, it cannot be defended. In *Attwood's Case* [22] it was suggested that the basis was the change in personality of the company but this was decisively rejected by Scrutton L.J. in *Reigate* v. *Union Manufacturing Co., Ltd.*[25] where it was demonstrated that there was no change in personality.

To arrive at the true principle it is necessary to remember that a contract of service is a contract in which both parties have continuing obligations—the one to work and the other to pay wages.

[20] [1937] Ch. 359.
[21] *Supra.*
[22] *Supra.*
[23] *Supra.*
[24] *Supra*
[25] *Supra*, at p. 606.

Now the effect of an order for winding up is to take the power of dealing with the assets of the company and of carrying out any obligation of the company out of the hands of the company and to put them into the hands of an officer of the court. This being so the company is necessarily unable to fulfil its obligations under the contract of service. The servant must be deemed to know the legal effect of a winding-up order and hence the winding-up order operates as a notice to him that the company cannot continue its obligations to him under his contract of service and thus constitutes a breach going to the root of the contract. This explanation has the added merit of explaining why the termination of the contract dates from the date of the order and not from the commencement of the winding up. What actually effects the dismissal is not the fact of winding up but the notice implied in the making of the order, which, as Romilly M.R. says in *Chapman's Case*,[26] is notice to all the world, that the company necessarily repudiates its part of the contract.

If this explanation of the effects of a winding-up order is accepted it leads to an explanation of the true position when there is a resolution to wind up voluntarily. The effect of such a resolution differs from a winding-up order since its effect is not to take the management out of the hands of the company and put it into the hands of an officer of the court. Before such a resolution is passed the management of the company is in the hands of its officers, the directors: after such a resolution it is in the hands of its agent, the liquidator, and there is no reason whatever why the company should not carry out its obligations under the contract of service acting by its agent, the liquidator. Hence notice of the passing of a resolution to wind up voluntarily is not notice that the company must necessarily repudiate its obligations and so does not automatically result in the termination of the contract.

That is not necessarily to say that the passing of a resolution to wind up voluntarily can never operate as a dismissal. In *Reigate* v. *Union Manufacturing Co.*[27] Pickford L.J. says:—

> "But before the winding up the company intimated to the plaintiff that they could and would not go on unless they obtained additional capital. . . . Having intimated that to him they proceeded to carry it out by going into voluntary liquidation and selling their business. . . . That was to my mind a breach of contract. It was an intimation that they no longer had any intention of carrying out the contract. . . . The voluntary liquidation is only part of the history of the repudiation."

Therefore it may be said that a resolution for voluntary liquidation does not necessarily indicate that the company repudiates the contract owing to its inability to continue to fulfil its obligations thereunder but it may operate as a repudiation if the surrounding

[26] *Supra*.
[27] *Supra*, at p. 601.

circumstances are such that the employee knows that, in fact, the resolution indicates such a repudiation. This view would accord with the above-quoted dictum of Greer L.J. since insolvency which was known to the employee would result in his knowing that liquidation would involve repudiation of the contract.

It is desirable to consider the effect of the appointment of a receiver and manager, not only for the sake of completeness but in order to discuss *Parsons and Others* v. *Sovereign Bank of Canada*,[28] which might otherwise be thought to throw some doubt upon the suggested basis of the rule. In that case there was an appointment of receivers and managers of a paper company which had running contracts for the sale of paper. The receivers and managers continued to supply orders and it was held that they did so under the original contracts and not under new ones made between the managers and the purchasers. Now it may be argued that if contracts of service are ended because, when an officer of the court is appointed to take over the assets of the company, it is put out of the power of the company to fulfil its obligations thereunder then so ought contracts for the sale of paper to be ended. There are two methods of disposing of this argument: the first is to be preferred but the second may be mentioned as it throws some light upon *Reid* v. *Explosives, Co., Ltd.*[29]

The first explanation is that contracts for the sale of paper are contracts which may be vicariously performed whilst contracts of employment, being contracts of personal service, cannot. (See as to vicarious performance of contract *British Wagon Co.* v. *Lea*[30] and *Tolhurst's Case*.[31]) This theory is supported by the judgment of Lord Haldane at p. 167, where he points out that contracts of personal nature may be determined by mere change in possession.

The second explanation depends upon the fact that whilst a receiver and manager and a liquidator may both be officers of the court their functions are quite different: it involves the suggestion, that is, that *Parsons' Case* would have been differently decided had it been a case of a winding-up order. The primary duty of a liquidator in a compulsory winding up is to realise the assets and wind up the company: the primary duty of a receiver and manager is to carry on the business. A receiver must carry out existing contracts on behalf of the company (see *Re Newdigate Colliery*),[32] whilst a liquidator need not and will not unless he thinks it to the advantage of the creditors or contributories.

The interesting point of this second explanation is its application to *Reid* v. *Explosives Co., Ltd.*[29] If it is accepted as true then the appointment of a receiver and manager has the same effect as a

[28] [1913] A.C. 161.
[29] *Supra.*
[30] 5 Q.B.D. 149.
[31] [1902] 2 K.B. 660.
[32] [1912] 1 Ch. 468.

resolution for voluntary winding up. It does not determine contracts of service unless there are other facts pointing to such determination and this is so because it is the duty of a receiver to continue and not to determine contracts so that, in the absence of other circumstances the employee can expect the receiver to adopt the contract. This view is in fact exactly that put forward by Fry L.J. in *Reid's Case*.[33]

This involves the rejection of the headnote to *Reid's Case*,[34] and it also involves the rejection of much of Lord Esher's judgment: however, whatever view is taken of *Reid's Case*, either Lord Esher or Fry L.J. must be rejected since the two judgments conflict. It is respectfully submitted that Lord Esher's argument is of itself faulty. As is seen from the above-quoted summary of his argument, he equates an employer shutting up his business with the appointment of receivers and managers[35] and this entirely ignores the fact that the whole duty of a receiver and manager is not to shut up the business but to keep it going as far as possible.

Summary.

The conclusions reached may be summarised as follows:—

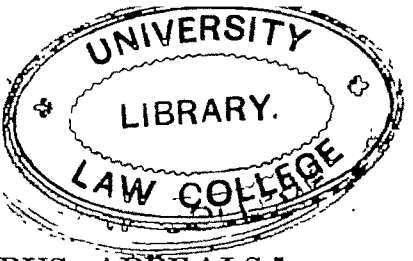
1. Notice of a winding-up order is notice that the company cannot continue to fulfil its obligations under the contract of service and hence operates as a repudiation to determine that contract.

2. Notice of a resolution to wind up voluntarily is not such notice since the company may continue to fulfil its obligations by its agent, the liquidator, but it will be notice if the surrounding circumstances are such that, taken together with the resolution, the employee knows that the company cannot continue to fulfil its obligations.

3. The appointment of a receiver and manager presupposes that he will continue the contracts of the company so far as possible, hence, as in the case of a voluntary liquidation, such an appointment is not notice of determination unless surrounding circumstances combine to make it so.

G. Boughen Graham.[36]

[33] *Supra*, at p. 269.
[34] *Supra*.
[35] At p. 267.
[36] Mr. Graham is a practising barrister.



HABEAS CORPUS APPEALS*

BEFORE the Judicature Act, 1878, appeal did not lie from any order made in habeas corpus proceedings remanding or discharging the person detained.[1] This position has remained, for reasons which will be considered in this article, almost unaffected by that Act and the present law may be summarised as follows:—

(1) No appeal lies from habeas corpus proceedings in a criminal cause or matter;

(2) No appeal lies from an award of the writ; and

(3) Appeal lies in all other cases.

We deal now with each category separately, beginning with appeals in a criminal cause or matter.

I

Section 19 of the Judicature Act, 1878, declares that the Court of Appeal, created by the Act, "shall have power to hear appeals from any judgment or order, save as hereinafter mentioned, of Her Majesty's High Court of Justice, or any judges or judge thereof," and the last clause of section 47 of the same Act provides that "no appeal shall lie from any judgment of the High Court in any criminal cause or matter, save in some error of law apparent upon the record, etc."

The classic definition of a criminal cause or matter was given by Lord Cave L.C. in *Re Clifford and O'Sullivan*.[2] He said: "In order that a matter may be a criminal cause or matter, it must, I think, fulfil two conditions which are connoted by and implied in the word 'criminal.' It must involve the consideration of some charge of crime, that is to say, of an offence against the public law, . . . and that charge must have been preferred or be about to be preferred before some court or judicial tribunal having or claiming jurisdiction to impose punishment for the offence or alleged offences." A civil cause or matter is a non-criminal one, and covers, therefore, all proceedings which are not criminal within the above definition. In criminal proceedings the defendant is charged with committing a particular crime. This is an obvious statement, but

* The author would like to express his thanks and gratitude to Prof. Glanville L. Williams for reading the manuscript and making many valuable suggestions. Of course, his kindness does not involve him in any responsibility for the views expressed.

[1] Although Lord Goddard, in (1949) 65 L.Q.R. 30, limits his observations to appeals in criminal cases the reasons he gives apply equally to other cases of habeas corpus, and Wilmot's opinion, Wilmot pp. 107, 109, is of a general nature. It applies with equal force to prevent appeals in all cases of habeas corpus.

[2] [1921] 2 A.C. 570, at p. 580.

it is important to keep it in mind. It is also important to remember that the character of the proceedings is decided by reference to the *proceedings themselves*, and not to any previous proceedings.

Turning now to habeas corpus, one finds that the only object of the proceedings is to question the legality of detention. It does not charge the custodian with the commission of any crime, and the custodian will pass unpunished even if the applicant is discharged. These facts apply to all kinds of habeas corpus proceedings, whether the confinement has arisen in a civil or criminal matter. "Of its very nature," said O'Halloran J.A., "it [the writ of habeas corpus] is a civil right—a transcendent remedy given to every person to invoke the aid of the High Court and the judges of that court to defend his personal freedom in all cases of wrongful confinement." [3] Again, Martin J. said: " . . . it is the remedy which the law gives for the enforcement of the civil right of personal liberty." [4]

The fact that the applicant was detained as a result of a criminal proceeding does not change the character of his application. As said by Waite C.J., delivering the judgment of the Supreme Court of the United States in *Ex p. Tom Tong* [5]: "Proceedings to enforce civil rights are civil proceedings . . . the prosecution against [the petitioner] is a criminal prosecution, but the writ of habeas corpus which he has obtained is not a proceeding in that prosecution. On the contrary, it is a new suit brought by him to enforce a civil right, which he claims, as against those who are holding him in custody, under the criminal process. . . . Such a proceeding on his part is, in our opinion, a civil proceeding, notwithstanding his object is, by means of it, to get released from custody under a criminal prosecution." The Supreme Court of the United States adopted the same view in *Kurtz* v. *Moffitt* (1885).[6] Martin J., of the Quebec Court of King's Bench, said in *R.* v. *Labrie* [7]: "The proceeding is one instituted by himself for his liberty and not by the Crown to punish him for his crime."

Ex p. Tom Tong [8] is of great interest. The Supreme Court of the United States in that case refused to entertain the appeal because the application for a writ of habeas corpus was a civil proceeding although the confinement was due to a criminal prosecution. The petitioner was proceeded against criminally in the police court of San Francisco for a misdemeanour in unlawfully establishing, maintaining and carrying on the business of a public laundry. Being restrained of his liberty under this process, he applied to the Circuit Court of U.S.A. for the District of California for a writ of

[3] *Ex p. Yuen Yick Jun* [1940] 2 D.L.R., at p. 437.
[4] *R.* v. *Labrie* (1921) 61 D.L.R. 299 at p 309. See also "Annotation" [1926] 2 D.L.R., at p. 6.
[5] (1888) 108 U.S. 556, at pp. 559–60.
[6] (1885) 115 U.S. 487.
[7] Above. This view was adopted by Cannon J. of the same court in *Ex p. Fong et al.* [1929] 1 D.L.R. 228, at p. 237.
[8] Above.

habeas corpus. The judges certified a difference of opinion. Revised statutes provided to the effect that the Supreme Court should have jurisdiction in those cases where a civil suit was instituted before a Circuit Court but only where a final judgment had been reached. In criminal cases no such final judgment was needed. It followed that if the proceeding under consideration were criminal, the Supreme Court would have jurisdiction, but not otherwise. Held, the court had no jurisdiction to entertain the appeal.

The same view prevails in British Columbia, where it is held that habeas corpus proceedings are civil even though confinement was due to criminal prosecution.[9] But the Supreme Court of Canada decided in *Re Storgoff* [10] that habeas corpus is not a civil remedy when used to question a conviction. Commenting on this case, Mr. D. M. Gordon argues that the belief that habeas corpus proceedings are civil may have arisen from confusing the meanings of "civil" in "civil" rights and "civil" proceedings.[11] It is submitted that that is not the case, as shown above.

Nevertheless, English courts have refused to accept the simple and self-evident fact that the nature of any proceedings is determined by the proceedings themselves. Instead of deciding the nature of habeas corpus proceedings by reference to these proceedings, which are started by the prisoner for his own protection, the courts referred to those which the gaoler had instituted or might institute against the prisoner for his conviction. The result was that section 19 of the Judicature Act, which allowed appeals in certain cases from the actual proceedings before the court, was taken to refer to completely different proceedings—proceedings which were not at the time awaiting the decision of the court entertaining the habeas corpus application.

The question of appeals from habeas corpus proceedings in a criminal cause or matter was exhaustively discussed by the House of Lords in *Re Clifford and O'Sullivan*.[12] Reference has already been made to the definition in this case of a criminal cause or matter [13]: it requires the consideration of some charge of crime, and that the charge must be preferred or about to be preferred before some court having or claiming jurisdiction to impose punishment for the offence or alleged offence. In a later case Viscount Simon [14] interpreted these two conditions in the following way: "It is the nature and character of the proceedings in which habeas corpus is sought which provide the test. If this matter is one the direct outcome of which may be trial of the applicant and his possible punishment for an

[9] *Ex p. Yuen Yick Jun* [1940] 2 D.L.R. 492; *R.* v. *Hanna and McLean* [1941] 4 D.L.R. 584; *State of New York* v. *Wilby* [1944] 3 D.L.R. 693.
[10] [1945] S C.R. 526.
[11] (1945) 23 Can.B.R. 595.
[12] [1921] 2 A.C. 570.
[13] Note (2) above.
[14] *Amand* v. *Home Secretary* [1943] A.C 147, at p. 156; see also *Ex p. Chapple* (1950) 66 T.L.R. (Pt 2) 932.

alleged offence by a court claiming jurisdiction to do so the matter is criminal. This is the true effect of the 'two conditions' formulated by Viscount Cave in *Re Clifford and O'Sullivan.*"

It is submitted, with all respect to Viscount Simon, that it is not the character of the proceedings in which habeas corpus is sought that provides the test. His Lordship's first sentence, taken by itself, is misleading, because it refers to habeas corpus proceedings whereas, in fact, reference is meant to be made to consequent or subsequent proceedings.

Re Clifford and O'Sullivan [15] was concerned with an order of prohibition, but the same test that was applied in that case to determine whether the appeal was in a criminal cause or matter applies to applications for the writ of habeas corpus. In that case by a proclamation issued on December 10, 1920, certain counties of Ireland were proclaimed to be under martial law, and another proclamation appointed a date before which arms, ammunitions and explosives should be submitted to the authorities. Any person found after that in possession of such arms, etc., would be liable on conviction by a military court to suffer death. The appellants, Clifford and O'Sullivan, who were civilians, were arrested, tried by a military court, convicted and sentenced to death, subject to confirmation. The appellants applied in the Chancery Division that a writ of prohibition might issue directed to the military court and to the C.-in-C. in Ireland and the military governor, to prohibit them from further proceeding with the trial of the appellants or from pronouncing or confirming any judgment upon them as the result of such trial or from carrying the same into execution or otherwise interfering with appellants, on the ground that the military court was illegal and had no jurisdiction to proceed with the trial. Powell J. refused the application, and the Court of Appeal in Ireland dismissed an appeal, holding that the order of Powell J. was made in a criminal cause or matter within section 50 of the Supreme Court of Judicature (Ireland) Act, 1877, and that consequently no appeal lay.

The House of Lords (Viscount Cave L.C., Lords Dunedin, Atkinson and Shaw of Dunfermline, with Lord Sumner dissenting) held that the order of Powell J. was not made in a criminal cause or matter because the court that convicted and sentenced was not a court-martial but a body of military officers entrusted by the commanding officer with the duty of inquiring into certain alleged breaches of his commands, and of advising him as to the manner in which he should deal with the offences. In other words, the second condition postulated by Viscount Cave L.C. was not fulfilled, and the absence of such condition made the order non-criminal and therefore appeal should have been entertained by the Court of Appeal.

[15] [1921] 2 A.C. 570. See also *Amand* v. *Home Secretary* [1943] A.C. 147.

This view of what is a criminal cause or matter is now settled law, having behind it the authority of two decisions of a strong House of Lords. But one may be allowed to make the following observations.

Viscount Cave L.C. thought that the tenor of the authorities led to his two conditions. But in the same case Lord Sumner, dissenting, said [16]: "I regret that I am unable to find any authority, hitherto decided, to support the two conditions which the noble and learned Viscount has laid down, and I think that the words of section 47 (of the Judicature Act, 1878), the tenor of the authorities and the practical working of this statutory definition alike show that the test must be the general quality of the subject-matter against which the proceeding in question . . . was directed." In other words, Lord Sumner supports the first condition and rejects the second. It is submitted, with respect, that Viscount Cave L.C.'s view is the better one, for it gives a wider scope for appeal. The limitations on the right to appeal should be as narrow as possible to enable the subject to have his right to liberty decided by the higher courts.

Viscount Cave's definition of criminal matter as that which involves a charge of crime is not very helpful, and he does not make it easier by explaining that a charge of a crime is a charge against public law, for this, as Kenny points out, still involves the question what is meant by "Public Law." [17] Public law has no recognised and determined field within which criminal law could be easily detected.

These theoretical considerations arise in a relatively small number of cases. Generally speaking, crimes are known and defined and a wrong can easily be "pigeon-holed" in the relevant category. But such a case as *R.* v. *Manley* [18] presents some difficulty because it created a crime which did not previously fit in any of the "pigeon-holes."

The second condition required by Viscount Cave L.C., namely, the necessity of having the charge preferred or about to be preferred before some court or judicial tribunal having or claiming jurisdiction to impose punishment for the offence or alleged offence, is also difficult to state as a satisfactory rule of law. Lord Sumner protested strongly against the introduction of such an element, and asked: "Where everything else is the same, why does that, which would constitute a criminal matter, if the parties prohibited possessed other jurisdiction but not the relevant one, become a matter not criminal at all, because they possess no jurisdiction, not even jurisdiction which is irrelevant?" [19] No reference was made to

[16] *Re Clifford and Sullivan* [1921] 2 A.C. at 588.
[17] *Outlines of Criminal Law*, 15th ed., at p. 4.
[18] [1933] 1 K.B. 529.
[19] *Re Clifford and O'Sullivan*, *supra*, at p. 527.

this requirement in the earlier cases of *R.* v. *Brixton Prison (Governor of)* [20] and *Ex p. Woodhall.*[21]

Perhaps the more serious criticism of this condition is that a prisoner awaiting trial and refused bail has no right of appeal if his application for writ of habeas corpus is refused. True, he cannot be detained indefinitely. Section 7 of the Habeas Corpus Act, 1679, enacted that any person committed for high treason or a felony plainly expressed in the warrant of commitment and who had prayed on the first day of the session to be tried, should be entitled to be discharged if he was not tried in the second assize following even though the trial was postponed because of the absence of a material witness for the Crown. But even this clear provision was brushed aside in at least one case.[22]

It is therefore better for an innocent prisoner to insist on his prosecution rather than on his right to habeas corpus. For if prosecuted and convicted he can appeal, but if he applies for a writ of habeas corpus and his application is refused he cannot. Nor can the prisoner on refusal of habeas corpus appeal to the Court of Criminal Appeal, for he was not tried on indictment. Indeed, it was *he* who started the proceedings.

Criticism, however, can go farther. The courts have given the widest interpretation to the two conditions laid down by Lord Cave. As to the first, it has been held that the wrong committed need not be criminal by English law [23] provided that it is criminal by the law of the country claiming jurisdiction over the prisoner.[24] In such circumstances the proceedings referred to in the second condition can never be started before English courts, for the prisoner committed no crime by English law. The only thing required is that there must be a prima facie case against the prisoner. This leads to a curious result: the prisoner, who committed no wrong according to English law, may be detained with no right to appeal against his detention.

One may be allowed to make a final observation on the distinction drawn by the courts between appeals in a criminal cause or matter and other appeals. As had been seen, the test does not refer to the proceedings in habeas corpus. It refers to proceedings not started by the applicant, and therefore, in fact, it introduces a test outside the real question that had to be considered by the court, namely, the legality of detention. It is submitted, therefore, that what should be considered is the character of the proceedings for securing the writ. Such proceedings are civil in character. Therefore, appeal should always lie in cases of refusal. The question to be determined is the illegality or otherwise of the detention. This is

[20] [1910] 2 K.B. 1056; (1911) 80 L.J.K.B. 57.
[21] (1888) 20 Q.B.D. 832.
[22] *R.* v. *Bowen* (1840) 9 C. & P. 509.
[23] *Ex p. Woodhall* (1888) 20 Q.B.D. 832.
[24] *Amand's Case*, *supra*, at p. 156.

different from the rights of the gaoler against the prisoner which he might follow through the proper course of the law. But the authorities against this view are so strong that only legislation can alter the present position.[25]

II

The question of appeal against discharge was thoroughly discussed by the House of Lords in *Cox* v. *Hakes*.[26] In that case a clerk having been sued in an Ecclesiastical Court for offences against the ritual of the church and pronounced guilty of contempt and contumacy, a writ *de contumace capiendo* was issued and he was arrested and imprisoned. A rule *nisi* for a writ of habeas corpus having been granted, the Queen's Bench Division made the rule absolute and the clerk was discharged from custody. The Court of Appeal reversed the judgment of the Queen's Bench Division. The House of Lords restored that judgment, holding that no appeal under section 19 of the Judicature Act, 1878, lay to the Court of Appeal from an order discharging a prisoner under a habeas corpus.

The House of Lords thus held that the law was not, in that respect, affected by the Judicature Act. In the court below the opposite view had prevailed. The Court of Appeal had thought that the discharge ordered by the Queen's Bench Division followed a wrong application of the Church Discipline Act, 1840, and that the Court of Appeal had jurisdiction to put the matter right and give the proper interpretation to the statute. The House of Lords did not discuss that point in particular, because the view was that discharge precluded appeal.

Section 19 of the Judicature Act, 1878, in general terms provides that appeal lies to the Court of Appeal from a judgment or order of the High Court except in those cases contained in section 47. The natural construction of that provision, in the view of the Court of Appeal, was that in all cases not within section 47 appeal lay to the Court of Appeal. This wide interpretation of the section was supported in the House of Lords by the dissenting Lords, Lords Morris and Field.

As already said, the House of Lords did not subscribe to this interpretation. The majority of their Lordships thought that an existing right of the subject, namely not to be liable to appeal against discharge, could not be destroyed by the general words of the section. More definite legislation was needed for that. In support of their conclusion, their Lordships advanced a variety of arguments : section 19 of the Act should not be interpreted literally but rather more stringently [27]; it should not be read in isolation from other parts of the Act which gave the Court of Appeal no power

[25] For further discussion see *Annotation, Constitutionality of Appeals in Habeas Corpus*, by R. M. Willes Chitty [1926] 2 D.L.R. 1.
[26] *Cox* v. *Hakes* (1890) 15 App Cas. 506.
[27] *Cox* v. *Hakes*, *supra*, at p. 517.

to order the re-arrest of a person discharged,[28] and the Court of Appeal could not add to its powers by relying on Ord. 58, r. 4[29]; there is no one whom the court would be bound *ex debito justitiae* to hear on appeal[30]; if appeal were allowed discharge would cease to be final and that would produce an unwarranted change in the meaning of section 8 of the Habeas Corpus Act, 1816[31]; reversal on appeal might possibly be futile because the subject could still apply to other courts for his discharge.[32] One cannot but admire their Lordships' untiring search for arguments to preserve an existing right, but so sweeping were some of the reasons given that they would equally prevent an appeal where the writ has been refused. Lord Bramwell perceived this and said: "My reasons would, perhaps, apply to a case where the prisoner had been remanded, but I limit my opinion to where he has been discharged."[33]

The House of Lords, further, refused to exercise its appellate jurisdiction to entertain an appeal in a case of discharge, although wide powers had been given to it under the Appellate Jurisdiction Act, 1876. Such general terms, the House held, cannot deprive the subject of an ancient and universally recognised constitutional right.[34]

It was urged in the later case of *Secretary of State for Home Affairs* v. *O'Brien*[35] that the *ratio decidendi* of the judgment of the House of Lords in *Cox* v. *Hakes* was that appeal did not lie because the prisoner was in fact discharged. And indeed the reasons given by their Lordships might lead to that conclusion. But the House held in *O'Brien's Case* that what was important and decisive was the order of discharge. It made no difference that the person was still in custody, for that did not prejudice and should not prejudice his right to immediate freedom as decided by the court issuing the order of discharge.[36]

This discussion, however, will not be complete without reference to some cases which, prima facie, lead to the conclusion that appeal lies against discharge. In view of the decision of the House of Lords, these cases can now be supported only on more limited grounds. Re-arrest was ordered in *Dugdale* v. *Reg.*[37] where a misdemeanant, convicted and sentenced, was allowed bail on a recognisance which did not comply with the requirements of the

[28] *Ibid.* at p. 529.
[29] *Ibid.* at p. 531.
[30] *Ibid.* at p. 519. But see the court below, 20 Q.B.D. at p. 14.
[31] *Ibid.* at p. 519.
[32] *Ibid.* at p. 524.
[33] *Ibid.* at p. 526.
[34] *Secretary of State for Home Affairs* v. *O'Brien* [1923] A.C. 603, *e.g.*, *per* Lord Dunedin at pp. 620–21.
[35] *Ibid.*
[36] See also the Irish case, *The State (Burke)* v. *Lennon and Att.-Gen.* [1940] Ir.R. 136, 157; the British Columbia case, *Re Hoessan Rahim* [1912] 4 D.L.R. 701.
[37] (1858) 2 E. & B. 129.

statute. The House of Lords in *Cox* v. *Hakes* thought that re-arrest was ordered because the judge who ordered discharge acted without jurisdiction.[38] With great respect, the reason given by the court itself, the Court of Exchequer Chamber, was that the judge misapplied the law,[39] a reason which makes the case on all fours with *Cox* v. *Hakes*.[40]

The Privy Council too, in a series of cases entertained appeal against discharge.[41] The House of Lords in *Cox* v. *Hakes* thought that the Privy Council's powers to enforce its judgments were very different from those conferred on the Court of Appeal, and that the relation of the Queen in Council to the colonial courts differed altogether from the statutory relation of the Court of Appeal and the High Court of Justice.[42] These cases, therefore, cannot be relied upon in English courts to justify appeal against discharge.

Another case to be distinguished is the House of Lords case of *Barnardo* v. *Ford*.[43] In that case, on the application of the mother for the custody of her child who was at an institution run by Dr. Barnardo, the Queen's Bench Division made absolute an order *nisi* for a writ of habeas corpus and the Court of Appeal affirmed the order. On a further appeal the House of Lords held that such an order was within the meaning of section 19 of the Judicature Act, 1878, and that an appeal lay from the making of the order to the Court of Appeal.

In *O'Brien's Case* [44] the House of Lords explained their judgment in *Barnardo's Case*. They said that no question was raised, or intended to be raised in that case as to the legality of detention. The sole question was whether the writ was directed against the proper person. The result of granting an appeal was only to allow further consideration of that question, not to raise again a question of legality which had been already determined. The child had been sent by Dr. Barnardo to Canada to a person who was outside the control of Dr. Barnardo and the writ should have been issued against this person. The power of re-arrest was not considered, probably because the child was outside the control of the mother, Dr. Barnardo and the court itself.

Barnardo v. *Ford* [1892] A.C. 326 was explained by the Court of Appeal of British Columbia in this way [45]: "It was held that an appeal in habeas corpus was within the section [19] where the appeal was not from an order discharging the person, but from one

[38] *Cox* v. *Hakes*, *supra*, at pp. 521, 525, 530.
[39] *Dugdale* v. *R.*, *supra*, at pp. 131–132
[40] See also Lord Goddard, "A Note on Habeas Corpus" (1949) 65 L.Q.R. 80, 86.
[41] *e.g.*, *Att.-Gen. for Hong Kong* v. *Kwok-a-sing* (1878) L.R. 5 P.C. 179; *Reg.* v. *Mount* (1875) L.R. 6 P.C. 283; *Att.-Gen. for the Dominion of Canada* v. *Fedorenko* (1911) 27 T.L.R. 541. See also N. Bentwich, "Habeas Corpus in the Empire" (1911) 27 L.Q.R. 456.
[42] *Cox* v. *Hakes*, *supra*, at p. 535.
[43] [1892] A.C. 326.
[44] [1923] A.C. 603.
[45] *Per* Macdonald C.J.A. in *Re Hoessan Rahim* (1912) 4 D.L.R. 701, p. 702.

granting a writ of habeas corpus although there was no inherent right of appeal." [46]

III

In all other cases where an application for a writ of habeas corpus has been refused an appeal lies, because the power of the Court of Appeal to entertain appeals in such cases was not excluded by section 47 of the Judicature Act, 1878, from the general power of appeal contained in section 19. Thus an appeal was entertained from refusal of a Divisional Court to issue a rule *nisi* for a writ of habeas corpus in the case of a German national who was interned as a prisoner of war.[47] Of the three Lords Justices who decided the case only one, Swinfen-Eady L.J., raised the question whether an appeal would lie, and he left the question open. It is submitted, however, that the case clearly was not in a criminal cause or matter.

Again in *R.* v. *Halliday* [48] Zadig was a person of hostile origin but had since become a naturalised British subject. He was interned under Reg. 14B of the Defence of the Realm (Consolidated) Regulations, 1914, which empowered the Secretary of State to order the internment of any person of "hostile origin or association." The Divisional Court discharged a rule *nisi* for a writ of habeas corpus and Zadig appealed. The Court of Appeal entertained the appeal and no question of jurisdiction was mentioned by counsel or court.

In *R.* v. *Secretary of State for Home Affairs, Ex p. O'Brien,*[49] the House of Lords upheld the judgment of the Court of Appeal entertaining an appeal from a refusal to issue a writ.

In neither case was the question of jurisdiction discussed. Lord Goddard [50] suggests that the Court of Appeal in *O'Brien's Case* apparently relied upon Ord. 58, r. 10, as giving them jurisdiction to entertain the appeal. That rule provides that where an *ex parte* application has been refused by the court below, an application for a similar purpose may be made to the Court of Appeal. But none of the learned judges mentioned the Order, for the question of jurisdiction was not discussed, and if the Court of Appeal has no jurisdiction it cannot enlarge it by reference to an Order. The court derives its jurisdiction from the Judicature Act, 1878, and the proposition that the Court of Appeal cannot by an Order increase its powers was one on which the House of Lords placed great reliance in the case of *Cox* v. *Hakes* discussed above. It is submitted that the true reason is that appeal is governed by the Judicature Act.

A. M. QASEM.[51]

[46] Irish law is the same as English law For a learned article on the subject see (1940) 74 Ir.L.T. 1. The amendment to the Constitution, it is submitted, did not change the law in this respect.
[47] *Ex p. Weber* [1916] 1 K.B. 280.
[48] [1916] 1 K.B. 738.
[49] [1923] A.C. 603.
[50] (1949) 65 L.Q.R. at p. 31.
[51] LL.M.(Lond.); barrister-at-law

STATUTES

COURTS-MARTIAL (APPEALS) ACT, 1951

THIS Act deals with two matters: Part I provides for appeals from courts-martial and Part II makes changes in the method of appointment, qualifications, tenure of office, salaries and pensions of the Judge Advocate General and his assistants. The Act applies to the three branches of the forces with unimportant differences and this note ignores the special provisions relating to the Royal Navy.

A Courts-Martial Appeal Court is set up. Its judges are (a) the L.C.J. and the puisne judges of the High Court, (b) Lords Commissioners of Justiciary nominated by the Lord Justice General, (c) judges of the High Court in Northern Ireland nominated by the L.C.J. of Northern Ireland, (d) other persons of legal experience appointed by the Lord Chancellor. The court, which may sit in two or more divisions, is duly constituted if it consists of an uneven number of judges, not being less than three. When the court is sitting in the United Kingdom, at least one member must be drawn from (a), (b) or (c) above; the Lord Chancellor may waive this requirement when the court is sitting elsewhere. Majority opinions prevail.

Under the procedure previous to this Act, there were three types of review of a court-martial finding of guilty. First, there was the review by the higher military authority which decided whether or not to confirm. Secondly, there was the review by the J.A.G. who was concerned primarily to see that the trial had been properly conducted. Thirdly, the prisoner could petition His Majesty for mercy asking for reduction of the sentence or for quashing the sentence. The Lewis Committee, whose recommendations (Cmd. 7608) were considered in Vol. 12 of this *Review* (at p. 228), suggested that a courts-martial appeal court should be substituted for the confirmation and for the review by the J.A.G. The Act, however, keeps the earlier types of review and adds the new court as a fourth stage. Except in the case of a conviction involving sentence of death, the right of appeal to the new court is not exercisable unless the prisoner, within a prescribed period, first petitions the Admiralty or the Secretary of State praying that his conviction be quashed and either the petition is not granted or a further period elapses. The court has, in any case, the right to refuse leave to appeal and must, in considering whether or not to refuse leave, have regard to any expression of opinion made by the J.A.G. that the case is a fit one for appeal.

The Lewis Committee recommended that appeals should be on questions of law alone but the Act makes no such limitation. The

court must allow the appeal if they think that the finding of the court-martial is unreasonable or cannot be supported on the evidence or involves a wrong decision on a question of law or that, on any ground, there was a miscarriage of justice. The court is empowered to dismiss the appeal if, although the point raised might be decided in favour of the appellant, they consider that there has been no substantial miscarriage of justice. From the decision of the court there can be a further appeal to the House of Lords if either side applies to the Attorney-General and he gives a certificate that a point of law of exceptional public importance is involved and that a further appeal is desirable in the public interest. The Act follows the recommendations of the Lewis Committee in not allowing any appeal against sentence. But it goes further than those recommendations in empowering the court to grant legal aid to an appellant whose means are insufficient. The court or the House of Lords on allowing an appeal may award costs to the appellant of such sums as appear to the court or the House to be reasonably sufficient compensation. The court on dismissing an appeal may order the appellant to pay costs. The J.A.G. may refer the finding of a court-martial to the court if he thinks a point of law of exceptional importance is involved; the Admiralty and the Secretary of State have the same power if they think the reference to be expedient having regard to matters which were not brought to the notice of the court-martial.

It will be seen that, as the Secretary of State said on the Second Reading of the Bill, this court is modelled on the Court of Criminal Appeal. Under the Act of 1951, however, leave to appeal can only be granted by the Appeal Court and must be obtained for appeal on questions of law as well as other questions. No provision is made concerning the pronouncement of judgments. The rules of court which may be made under the Act of 1951 have not yet been published and it is not therefore clear to what extent the prisoner or the Appeal Court will be provided with the reasons on which the court-martial arrived at its decision. Another difference between the two courts is that, under the Act of 1951, the appellant is not, without special leave or in accordance with the rules of court, entitled to be present at the hearing of the appeal.

The Bill was welcomed on both sides of the House of Commons but the Second Reading debate was somewhat restricted in scope because of rulings by the Speaker and two Deputy-Speakers which excluded discussion on courts-martial themselves and on the recommendations of the Lewis and Pilcher Committees. Criticism of the Bill was, however, voiced by Mr. Blackburn who regarded the Bill as "grossly and utterly inadequate"; his main reasons were that no jury is called on to determine the guilt of the prisoner at any stage and that the decision of the Court of Appeal ought to be unanimous.

The effect of this first Part of the Act seems likely to depend very largely on the way in which the power of the Judge Advocate General to review decisions is carried out. As has been said above, the Lewis Committee suggested that the Court of Appeal should replace this review. The act, however, retains it, because, said the Secretary of State, "we feel that, even in the new circumstances, this will be of great value in acting as a filter so that the Appeal Court should not be overladen." In the previous note in this *Review* (referred to above) I invented the story of Pte. Koons who absents himself for a fortnight with every intention of returning but who on his return faces a charge of desertion rather than absence without leave because a spate of such absences makes the more serious charge necessary for reasons of discipline. The intention to return should defeat the charge of desertion. Suppose, however, that Pte. Koons is convicted of the charge. He wishes to appeal on the grounds (1) that as a matter of fact, he intended to return and (2) that, therefore, as a matter of law, he was not guilty of desertion. What must he do? First, he must wait to see if the decision is confirmed by the higher military authority. Secondly, if it is confirmed, he must petition the Secretary of State praying that his conviction be quashed. What is not clear is whether the Secretary of State in fact acts at this stage on the advice of the J.A.G. whose department will be considering the decision to ensure that the court-martial was properly carried out. It seems probable that the Secretary of State will follow this course. Thirdly, on the refusal of the Secretary of State to quash the decision, Pte. Koons must apply to the court for leave to appeal. The court, as said above, is required to have regard to any opinion of the J.A.G. that the case is a fit one for appeal. Again, what will happen in practice is of great importance but is obscure. Will there normally in each case be a communication between the court and the J.A.G. in which the latter will state whether or not he wishes to declare his opinion that the case is a fit one for appeal? How far will the court rely on the expression of this opinion or its absence as the determining factor in the decision whether to allow leave to appeal? The dangers are clear. First, if the Secretary of State does act on the advice of the J.A.G. in deciding not to quash the conviction on petition, the J.A.G. in considering later whether the case is a fit one for appeal will be in a somewhat difficult mental position. Secondly, and more importantly, since the purpose of retaining the review by the J.A.G. is to protect the court from being over-laden, too great reliance by the court on the J.A.G.'s opinion that the case is a fit one for appeal or the absence of this opinion, can easily jeopardise the whole of this Part of the Act. If it becomes known that the J.A.G. in effect determines whether leave to appeal is to be granted, a new form of dissatisfaction will replace the old. There is surely a strong case for following the practice of the Court of Criminal Appeal and allowing appeals on questions of law to be as

of right and in any other case to allow the court-martial to give leave to appeal. Where the members of the court-martial are not unanimous in their opinion, there should in any case be a right of appeal to the court. More could be done, without burdening the court too much, to reduce the number of occasions on which Pte. Koons can complain "I wanted to appeal but the army wouldn't let me."

Part II of the Act makes certain charges with respect to the office of the J.A.G. Future appointments to this office are to be made by His Majesty, on the recommendation of the Lord Chancellor, instead of the Secretary of State. To assist the J.A.G. the Lord Chancellor may appoint a Vice Judge Advocate General, and deputy Judge Advocates. At least ten years', seven years' and five years' standing as a barrister is a condition of appointment to these offices respectively. The Lord Chancellor may dismiss for inability or misbehaviour and the normal age for retirement is 70 years in the case of the J.A.G. and 65 years for the other officers. Salaries and pensions are provided for. The function of prosecuting is performed by the departments of the Secretary of State so that the department of the J.A.G. is now entirely judicial.

Any similarity between the abbreviations above and the initials below is purely coincidental.

J. A. G. GRIFFITH.

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NOTES OF CASES

Licences in Administrative Law—Retrospective Effect—Licence by Estoppel

The House of Lords managed to do justice in *Howell* v. *Falmouth Boat Construction, Ltd.* [1951] 2 All E.R. 278, but in a way that may, with every respect, be said to invite trouble in future cases. It was held, reversing the Court of Appeal (see *ante*, Vol. 18, p. 876), that a licence under the Defence (General) Regulations, 1939, had to be in writing; thus an oral permission was of no avail. In order to mitigate the effect of this interpretation the House held that a subsequent written licence might on the construction of the particular regulation be retrospective, despite the general principle that a licence cannot be retrospective (see *Sovfracht* v. *Van Udens Scheepvaart* [1948] A.C. at 218). Thus when another case of this kind arises everything will turn on two questions: whether the oral permission has been subsequently confirmed in a written licence which can be construed to be retrospective, and whether an intention to validate such a retrospective licence can be spun out of the words of the legislation.

It is a pity that Denning L.J.'s decision in the Court of Appeal, [1950] 1 All E.R. 588 (see 18 M.L.R. 376), found no favour with their Lordships, for he propounded a bold and imaginate solution that held great possibilities of development. The learned Lord Justice said that even if a written licence were legally requisite, the repairers did not act illegally since "whenever government officers in their dealings with a subject take on themselves to assume authority in a matter with which the subject is concerned, he is entitled to rely on their having the authority which they assume." Although this principle was stated with reference to governmental "authority," it could have been developed to include every case where the defendant was assured by a government agency that his act was legal, and so have afforded a welcome relief from the rule that ignorance of the law is no excuse. Lord Simonds said he knew of no such principle in our law as that stated by Denning L.J., nor was any authority for it cited. It is true that there was no previous English authority for Denning L.J.'s principle, or for the wider version of it just suggested; but there was good American authority. As an American writer puts it, "confidence in the government itself would be seriously undermined if citizens should be punished for apparently innocent deeds done in bona fide reliance upon the advice of officers who are authorised by the state to give such advice" (Perkins in (1939) 88 U. of Pa.L.Rev. at 48; and see Dession, *Criminal Law, Administration, and Public Order*, 578–9;

Michael and Wechsler, *Criminal Law and its Administration*, 796; Hall, *Criminal Law and Procedure*, 557–8).

The effect of *Howell's Case* seems on its face to be that a ship-repairer who acts in bona fide reliance upon an oral governmental permission is defeated if no written licence is subsequently issued; he is therefore at the mercy of the government in the meantime. Is this an example of the "rule of law"? The most that Lord Normand (who spoke in effect for the House) would concede was that where the Crown had power to grant a retrospective licence and did so, the omission of an item from the licence would not be fatal to the contractor's action on a contract in respect of that item, if the proper officer came forward to depone that all the work done had in fact his authority. It may be noted that this rule, though required by justice, had no more specific English authority behind it than Denning L.J.'s principle. Also, it is hard to see why it should be so hedged about with limitations. Why should the government officer have to depone that he gave his oral assent, if there is satisfactory evidence aliunde that the assent was given? And why should the rule be confined to a case where a written retrospective licence is given but an item omitted: why should it not extend to a case where no written licence is subsequently given, or where a written licence is given that is stated to be non-retrospective? Perhaps Lord Normand would have been willing to extend the rule in this way. But if so, the rule becomes that an oral permission is good without a subsequent retrospective licence if the government have power to issue such a retrospective licence. It is difficult to comprehend the reason for the condition.

To return to Denning L.J.'s principle, it could have been supported (as he apparently supported it) as resting on an estoppel or quasi-estoppel binding on the Crown. Another instance of an estoppel in criminal law is the defence of autrefois convict or acquit. The former notion that the Crown cannot be bound by an estoppel in pais is now exploded (Spencer Bower, *Res Judicata*, 129; Williams, *Crown Proceedings*, 110–111). Alternatively, the officer of the Crown could have been regarded as having authority to state "the law" for the purpose of the rule that ignorance of the law is no excuse (cp. Jerome Hall, *General Principles of Criminal Law*, 362–8). An interesting result of Denning L.J.'s view if it had been accepted is that the soldier's defence of superior orders would have fallen neatly into place. There is no sufficient reason for distinguishing between a soldier who acts under seemingly lawful orders and a citizen who acts under seemingly lawful governmental authorisation or advice.

Another line of authority in the United States is to the following effect. Where the defendant acted in reliance on a case that had decided a prohibitory statute to be unconstitutional, and this case was overruled by a superior court after the defendant acted, his ignorance of the law (resulting as it did from a decision of the

court) is a defence to a criminal charge. See *State* v. *O'Neil* (1910) 147 Iowa 513, 126 N.W. 454, 33 L.R.A. (N.S.) 788, reprinted in Harno, *Cases and Materials on Criminal Law and Procedure*, 67 (and see *ibid.*, 69, n. 2); Michael and Wechsler, *op. cit.*, 796; Mikell, *Cases on Criminal Law*, 3rd ed., 568; Hall, *Criminal Law and Procedure*, 551; cp. (1911) 9 Mich.L.Rev. 384. The question may arise in England with regard to delegated legislation that is first held to be ultra vires and later held intra vires. The principle, if valid, would logically apply to an act done in reliance on subordinate legislation that has not been before the courts, which is held ultra vires after the defendant has acted (cp. Perkins, *op. cit.*, at 48–5; but see Michael and Wechsler, *op. cit.*, 797), or in reliance on a case declaring the common law, which case is later overruled.

The reason usually given for the American exception is that conviction in such circumstances would be manifestly unfair, and this seems to be reason enough. Those who prefer may accept the suggestion of Hall, *General Principles of Criminal Law*, 360, that there is not in such circumstances a mistake of law. The law, for the purpose of the rule, is as it appears to be laid down by the legislature, or by the courts in decisions that are valid for the time being.

If the exception is valid, it would seem to apply to the defendant who is charged in the case in which the overruling decision is given. This defendant must therefore be acquitted, although the court expresses its opinion that the law under which he is charged is valid. Presumably this expression of opinion will be binding under the doctrine of precedent, although it does not directly lead to the determination of the issue.

If an argument along these lines is accepted, it comes very close to settling the point in *Howell's Case*. The oral permission in that case was very like a piece of ultra vires delegated legislation, and the repairers' reliance on it should therefore have excused them from a criminal charge. This should have been enough to exclude the plea of illegality in contract.

There seem to have been only two English authorities on the general question before *Howell's Case*. In *Dennis & Sons* v. *Good* (1918) 88 L.J.K.B. 388, it was held that an order of the Board of Agriculture to plough a field was no excuse to a farmer for ploughing up a footpath. The order did not specifically purport to authorise the ploughing of footpaths, so that the present question hardly arose; but Avory J. seemed to think that even if the order had so purported, it would have been no defence, because ultra vires. This view creates an unnecessary injustice. The opposite view would not give the government carte blanche to authorise breaches of the law, because (1) the defence would apply only where the government order created a mistake of law, and (2) the order would be no defence to an action in tort. The existing powers of the

government are so great in respect of the administration of the criminal law that it is hardly any check upon a government bent upon an illegal course of conduct; it is the civil law, if anything, that provides such a check. There is therefore no political danger in allowing the subject a defence to a criminal charge.

An indication that the criminal courts may come to proceed upon these lines is supplied by the second case, *R.* v. *E. Walcot Bather, Ltd.*, The Times Newspaper, July 17, 1950, 94 S.J. 582, [1950] C.L.Y. 441. The Minister of Health had issued a circular stating that the value of work done by the licensee with his own hands should not be taken into account in issuing a building licence; but in a prosecution for exceeding a licence by the value of such work it was actually argued for the Crown that the circular had not the effect of law and was only a matter of mitigation. The Court of Criminal Appeal apparently accepted this view, but exercised its discretion to discharge the accused without punishment. This power to discharge without punishment blurs the line between what is a matter of defence and what is matter of mitigation in criminal law. The chief practical difference is that it is discretionary to discharge without punishment, and different judges may go different ways in the exercise of the discretion. It is therefore to be hoped that the criminal courts will be able to develop a defence on the lines of the American authorities, so that the freedom of the subject in circumstances like these does not depend on judicial discretion. Yet it seems that the criminal courts can now do this only if they are bold enough to leave the remarks in *Howell's Case* on one side as remarks made in a civil case and on the civil law.

This leads to the question whether any distinction can properly be drawn between criminal and civil law. In civil law the merciless rule still acted upon by the courts is that stated by Lord Simonds in *Howell's Case*: "What is done in contravention of the provisions of an Act of Parliament cannot be made the subject-matter of an action." No satisfactory reason has ever been advanced for a rule stated in these sweeping terms. It seems to be accepted as a self-evident truth, which it certainly is not. The effect of the rule is to impose upon the contractor a forfeiture of the whole contract price, notwithstanding that he was acting in good faith and notwithstanding that when charged in a criminal court he is merely fined a trifling sum or discharged without penalty. When the whole tendency of criminal administration is towards individualisation of punishment, why should the civil courts maintain this arbitrary forfeiture? It is arbitrary because its amount is affected not by the innocence of the plaintiff or the guilt of the defendant but solely by what happens to be outstanding under the contract.

Will the rule be applied if the plaintiff has literally contravened an Act of Parliament in circumstances that give him a defence to a criminal charge? He may, for example, have acted under a

mistake of fact, or under duress. Surely in such a case he ought to be allowed to recover in an action on the contract. But if the civil courts thus take account of what is an absolute defence to a prosecution, why do they not take account of matter that may be advanced in mitigation, especially when it goes so much in mitigation that the criminal court will discharge without punishment?

GLANVILLE WILLIAMS.

POLICY AND DISCRETION IN LICENSING FUNCTIONS

To what extent, if at all, are licensing justices entitled to adopt a general rule for the future guidance of their attitude to a particular class of application? This question has been before the courts on a number of occasions, and until the ambiguous judgments in *R.* v. *Rotherham Licensing JJ., ex p. Chapman* [1939] 2 All E.R. 710, the law seemed reasonably clear. Doubts created by that case have now been removed by the Divisional Court in *R.* v. *Torquay Licensing JJ., ex p. Brockman* [1951] 2 K.B. 784. The true position was succinctly stated by Lord Goddard C.J., who delivered the judgment of the court: "The justices cannot make a rule to be applied in every case without hearing it. They may lay down for themselves a general rule but are bound to consider whether it is applicable to any particular case" (at p. 789). In other words, although they have a duty genuinely to exercise a discretion by considering each individual case on its merits, the due discharge of this duty is compatible with the adoption of a general policy in relation to a class of case. One qualification must be added: the policy of the justices must be reconcilable with the policy of the Act from which they derive their powers; it must not be an irrelevant consideration that they are impliedly precluded from taking into account. That these principles also govern the conduct of other types of licensing authorities is shown by the well-known judgment of Bankes L.J. in *R.* v. *P. L. A., ex p. Kynoch, Ltd.* [1919] 1 K.B. 176 at pp. 183–5.

The law laid down in the *Torquay Case* is firmly rooted in sound sense, for, as the Lord Chief Justice said in the course of argument (at p. 786): "Every bench of justices has some sort of policy with regard to licensing applications." Later, in delivering judgment, he observed (at p. 788) that "if the justices have decided upon a policy to guide them in considering applications it is only fair that they should make it public so that applicants may know what to expect." One may respectfully express agreement with this observation, which could well be brought to the attention of other licensing authorities whose decisions are not published in series of reports.

As is usual in the situation typified by the *Torquay Case*, the conduct of the justices was impugned only on the ground that they

had unlawfully fettered their discretion, and not on the ground that they had violated the rules of natural justice by exhibiting bias. It can be regarded as certain that had the allegation of bias been raised it would have received short shrift. Yet the justices could not be said to have acted with wholly open minds; the chairman of the justices had announced, some months before the applicant in the present proceedings had sought a full licence, that full licences would in future be granted only in very exceptional circumstances. Although the analogy is by no means complete, the situation resembled in some ways that which existed in the *Stevenage Case* [1948] A.C. 87. There the Minister had been placed by Parliament in a position where his attitude towards the confirmation of a new town designation order was bound to be coloured by his views on the right policy to pursue, and he had in fact made no secret of his views; nevertheless, the validity of his confirmation of the order was upheld, there being no evidence that he had not honestly considered the case for and against the order. The House of Lords held, moreover, that complaints of "bias" were irrelevant because the Minister's functions were purely "administrative." This convenient verbal device would not have been available to the court in the present case, for the functions of licensing justices are recognised as being partly judicial, and a decision will be quashed by certiorari if the personal interest or pronouncements of individual justices had given rise to a real likelihood that bias would be shown towards an applicant. Had the question of bias been raised the court might have drawn a distinction between the illegitimate "private bias" of individual justices and the often permissible "official bias" of the bench in regard to a particular class of application. It might have said that whilst the justices must not treat an individual application as a *chose jugée*, they are not obliged to act with the unblemished open-mindedness of the ideal judge, and that as members of an administrative tribunal concerned with the formulation and application of standards of policy it is enough in some cases for them to keep their minds ajar. This judgment will doubtless never be delivered; but if it were, how many of those critics who were scandalised by the *Stevenage Case* would be moved to protest?

S. A. de Smith.

The Danger of John Doe

"Professional licence, if carried too far, your chance of promotion is likely to mar," said the Lord Chancellor in *Iolanthe*. A cursory reading of *R.* v. *Weisz and Another, ex p. Hector MacDonald, Ltd.* [1951] 2 All E.R. 408 might suggest that the penalties were somewhat heavier. In that case there was an application on behalf of a firm of bookmakers to commit a solicitor and his client for contempt

of court. The solicitor had issued a writ claiming for his client a sum of money as being due upon an account stated. In fact the sum claimed represented an alleged gaming debt, a claim which had, incidentally, already been disallowed by Tattersalls. The attempt to commit for contempt followed some preliminary skirmishing. For his part the Lord Chief Justice had, in his evidence before the Royal Commission on Betting, said: "If ever another case of that description" [*scil.*: an action on a gaming debt disguised as an account stated] "comes before me, I intend to have steps taken so that the matter may be brought before the court and judgment given as to whether it is contempt or not. For myself I have no doubt that it is." As a commentary on that statement the Law Society published an opinion of the Council, stating that there was in the Council's view "no question of it being professionally improper" to accept instructions to sue for a gaming debt, and that the Council understood that the Lord Chief Justice's statement referred exclusively to the account stated device. (See *The Law Society's Gazette*, March, 1951, at p. 105.)

An opportunity to determine the issue came in the present case, and the Lord Chief Justice found the solicitor, but not the client, guilty of contempt, since it was the former who was responsible for issuing the writ in the form it took; the client had merely directed that proceedings should be taken. It should be noticed that the indorsement of the writ had been settled by counsel, but there was no application in respect of him. For various reasons, although the solicitor was found to be in contempt no penalties were imposed on this occasion. The nature of the contempt should be carefully observed. The Lord Chief Justice said (at p. 412): "It has never yet been held, however, that merely to bring, or cause to be brought, an action which is an abuse can be treated as contempt, even though it has been brought for the purpose of pressure, or what may be called 'showing up.' If it were held that to bring an action prohibited by the Gaming Acts was punishable, it would mean that the court was treating as criminal something for which Parliament had not provided a penalty. . . . It is necessary to emphasise that the contempt in the present case lies not in bringing an action forbidden by the Gaming Acts but in bringing it as a feigned issue so as to conceal its true nature from the courts." The difficulty is, however, to know what is a "feigned issue" concealing the true nature. In *MacDonald* v. *Green* [1951] 1 K.B. 594 the original gaming debt was owed to a bookmaking firm Hector Macdonald, Ltd., the action being brought as for a private loan by the managing director, the particulars of claim disclosing merely a loan and apparently making no mention of the gaming background [[1951] 1 K.B., at p. 596]. In *Coral* v. *Kleyman* [1951] 1 All E.R. 518 it does not seem from the report that the nature of the sum due was apparent on the face of the plaintiff's pleadings. Similarly, in *William Hill (Park Lane), Ltd.* v. *Hofman* [1950] 1 All E.R. 1018

the true nature and history of the transaction was apparently only revealed by the defendant's affidavit. Were the plaintiffs in these three cases in contempt, therefore, for concealing the true nature of the action? If so, the hazards of finding the precise meaning of the phrase "alleged to be won upon a wager" in section 18 of the Gaming Act, 1845, are greatly increased. Yet that is a legitimate quest, since there was no unanimity on that point even among the majority of the House of Lords in *Hill* v. *William Hill* [1949] 2 All E.R. 452. The difficulty is often that the "true nature" of the transaction may well not be known until the court has decided. No doubt the plaintiffs in each of the three cases above believed that they had circumvented the Gaming Acts and were therefore disclosing the true nature of the transaction. Such, however, was not the view of the courts. The issue is one of greater importance than the discussion of gaming cases suggests. Gamblers may well be left to face an extra hazard. The same issue arises, however, in illegal contracts. The borderline between minimising your tax liability (which is lawful) and illegally evading tax is at the same time, though in different senses, both fine and misty. *Napier* v. *National Business Agency, Ltd.* [1951] 2 All E.R. 264 points that moral. By omitting any reference to the history or purpose of the transaction in such cases would the plaintiff be concealing? He may well have honestly believed such matters to be irrelevant.

Too broad an interpretation of this head of contempt could raise a considerable obstacle to free access to the courts. The limitations emphasised by the Lord Chief Justice are therefore important. Moreover it would seem that his phrase "so as to conceal its true nature from the court" must be read in the sense of "with a deliberate intention to conceal and mislead" rather than "in such a way as in fact to conceal." The knowledge and intent of the plaintiff and of his legal advisers are therefore relevant and important. On that basis the present case goes no farther than such cases as *Coxe* v. *Phillips* (1786) Lee t. Hard. 287 (to which reference was made) or *Linwood* v. *Andrews and Moore* (1888) 58 L.T. 612, where the deliberate intent was manifest. If this interpretation be correct solicitors may, where the law is uncertain, still act freely on behalf of audacious clients without worrying unduly about the shadow of the Tipstaff. Nevertheless even on this narrow interpretation one wonders how it was that John Doe and Richard Roe did not spend the greater part of their fictitious lives purging their contempt, certainly they would have been unwelcome persons to attorneys, for whom the walls of a prison would have been as substantial as the dealings which they attributed to those famous spirits were feigned. Sir Henry Maine would no doubt count the change of attitude as a sign of grace and a mark of maturity in English law.

J. D. B. MITCHELL.

Merchandise Marks Act—Intent to Defraud

By the Merchandise Marks Act, 1887, s. 2 (1), it is an offence to sell goods under a false trade description unless the seller proves that he had no intent to defraud. In *Kat* v. *Diment* [1951] 1 K.B. 84, the defendant sold bottles labelled "non-brewed vinegar"; this was the customary description of the contents in the trade, and there was no evidence that it bore any different meaning to the public. It was held that the description was not a true one, the article not being vinegar. The defendant was thereupon convicted.

The Merchandise Marks Act and the Food and Drugs Act, which were passed to secure commercial honesty, have too often been instruments for securing an assumed purity of language. The present decision looks like another example of the old "proper meaning" fallacy: the court refuses to admit that an adjective can remove the thing from the genus apparently indicated by the noun. Let no judge henceforward refer to his judicial ermine, or to an involuntary bailee, or a void contract, or a bigamous marriage, for such an expression is open to the same objection as that for which Mr. Kat was convicted.

The result of the decision is that a manufacturer who in perfect good faith has been making a wholesome and useful product known in the trade as non-brewed vinegar is suddenly told that he is a criminal for calling it that. What alternative name is he to give it? Apparently he must invent some odd-sounding trade name; but if there are several manufacturers in the field we may still be without a generic name for what they make.

The law is acquainted with a notion called prescription. In this case the product had been called vinegar ever since 1890—at first wood vinegar, then table vinegar, and latterly non-brewed vinegar. One would have thought that this was sufficient evidence of usage. Moreover, one knows that the vendors of malt vinegar are always careful to emphasise the word "malt." Apparently in *Kat* v. *Diment* the court regarded usage as having petrified for the purpose of the Merchandise Marks Act in 1887, but it is, with respect, difficult to believe that this was the intention of section 18 of the Act.

It is submitted that even if the product had been a recent invention, that fact should not in itself have disentitled it to be called vinegar. The questions for consideration are two. (1) Is the product intended to serve and does it serve the same or substantially the same purpose as the established product? (It was found that non-brewed vinegar served the same purpose as malt vinegar.) (2) Has it any disadvantages not possessed by the established product? (It was found that non-brewed vinegar was wholesome.) If these questions are answered favourably to the substitute product, and if it is given a suitable distinguishing adjective (what word would put any housewife on inquiry better than "non-brewed"?), there

would seem to be no reason for not allowing it to take the generic name of the established product. The manufacturers of the latter will still be able to emphasise that they make the genuine, original article, and to warn the public against substitutes. If the public, on grounds of price or otherwise, prefers the substitute, it is surely entitled to the preference.

Another surprising feature of the case is the rejection of the defendant's defence that he had no intent to defraud. Lord Goddard C.J. said that under the statute the accused could escape if he showed that he did not do the act intentionally, but here he had sold the bottles intentionally. With respect, this seems to be a misreading of the statute. What the statute says is that the accused can escape if he shows that he did not intend to defraud, and one can intentionally sell bottles which are in fact mislabelled without intending to defraud.

It is a defence to a charge under the next subsection of the Act, section 2 (2), to show that the accused acted innocently. Lord Goddard said that there was no difference between acting without intent to defraud under subsection (1) and acting innocently within subsection (2), and he therefore relied on authorities under subsection (2) in order to reject the defence under subsection (1). But if there is no difference, why did Parliament use different expressions? A person who acts negligently is held not to act innocently (*Wood* v. *Burgess* (1889) 24 Q.B.D. 162; *Allard* v. *Selfridge & Co.* [1925] 1 K.B. 129); but it is accepted legal principle that a person who honestly (though negligently) believes in the truth of his statement does not intend to deceive, and therefore does not intend to defraud. In *Brend* v. *Wood* (1946) 175 L.T. 806, Lord Goddard held that on a charge of possessing a forged document "with intent to deceive," where the accused was found in possession of a forged petrol coupon which he had received from someone else without knowing that it was forged, the offence was not made out.

Slatcher v. *George Mence Smith, Ltd.* [1951] 2 All E.R. 888 is a decision on section 2 (2) of the Act. It was held that the defendant did not act innocently if he acted innocently but his servant acted wrongly. A mere statement of this decision seems to be sufficient to show that something must have gone wrong with the reasoning. It is opposed to the earlier case of *Thompson* v. *Howard* (1944) 108 J.P. 246, which does not appear to have been cited.

GLANVILLE WILLIAMS.

"FOUND" IN CRIMINAL LAW

THE word "found" is of considerable importance in criminal law, because many statutes authorise the arrest without warrant of persons "found" in certain situations, or make it a special offence

to be so "found." We now have a fresh ruling upon the meaning of this word: it appears from *R.* v. *Lumsden* [1951] 1 All E.R. 1101 that to be "found" in a building the accused must have been seen in it; it is not enough that he is seen emerging from the door. *Thomas* v. *Powell* (1898) 57 J.P. 329 (which is noted in Burrows' *Words and Phrases*) was not cited to the court: in that case an opposite conclusion was reached on the interpretation of the word in the Licensing Acts.

According to American authorities, a person may be "found" otherwise than through the sense of sight. Hence it has been decided that a person may be "found" committing an offence or may commit it "in the presence of" an officer if the officer is apprised of it through the sense of hearing or smell: see *Dilger* v. *Commonwealth* (1889) 88 Ky. 550, 11 S.W. 651, and other cases in Dession, *Cases on Criminal Law and Procedure*, 298–4. A taking on fresh pursuit is in law a taking at the time at which and the place from which the pursuit started ((1939) 20 British Year Book of International Law, 86–7). Where a statute empowers the arrest of a person found committing an offence, it seems that an arrest is lawful if the culprit is "found" by a private person, who summons a constable, who in turn arrests on fresh pursuit in the absence of the person who found the culprit: see *Stevenson* v. *Aubrook* [1941] 2 All E.R. 476. In any event it would be lawful for the constable to assist the finder to effect the arrest: see Warner in (1948) 21 Can.Bar Rev. at 203. A person cannot be "found committing" an offence that in its nature is not visible, such as failing to support his wife: *Horley* v. *Rogers* (1860) 2 E. & E. 674. See generally 14 Eng. & Emp. Dig. 185–6. These difficulties suggest a doubt as to the policy of limiting the power of arrest by words like "found" or "presence." The important question for Parliament to consider in giving a power of summary arrest is whether the offender is likely to escape if not immediately arrested, and the question whether the offence was committed in the view or vicinity of the arrestor is of no relevance to this.

GLANVILLE WILLIAMS.

STANLEY *v.* POWELL IN THE COURT OF APPEAL

IT is not often that a general problem of liability in tort comes before the Court of Appeal, and when the problem is whether inevitable accident constitutes a defence to trespass, the case may be expected to arouse considerable interest. Yet those who turn to *National Coal Board* v. *J. E. Evans & Co. (Cardiff), Ltd., and Another* [1951] 2 All E.R. 310 hoping to find new light being shed upon this matter are destined for disappointment, for there is nothing fresh in these judgments (which were not reserved), and a good deal that is open to criticism. Much important material

appears to have been overlooked, while that which has been investigated has only been cursorily surveyed.

The case was an appeal from a decision of Donovan J. whereby he held the defendants liable for trespass to an electric cable, the property of the National Coal Board, which was sunk under land belonging to the Glamorgan County Council. The Council engaged the first defendants as contractors to erect new workshops at the School of Mines, Treforest, Pontypridd. The work to be done included the cutting of a trench for drainage purposes across land occupied by the School of Mines. The second defendants were employed as sub-contractors for the purpose of excavating this trench. A plan supplied to the contractors by the County Council showed the line of the required trench, but there was nothing to show that under the land athwart the line of the proposed trench there was an underground cable belonging to the National Coal Board, which carried electricity at high voltage from one colliery to another. This cable had been laid by the colliery people without the knowledge or permission of the County Council, and it went underground at a pylon quite near the site of the proposed trench, and re-emerged some four hundred yards away at another pylon. If the cable had run in a straight line between the two pylons, it would have been nowhere near the proposed trench, but instead it pursued an erratic course which brought it across the line of the trench. A mechanical excavator, operated by the second defendants, in the course of excavating the trench to the required depth, struck and broke the concrete cover of the cable and hit the cable itself. This damage was reported to the clerk of works of the County Council and the manager of the sub-contractors, but no steps were taken to notify the owners of the cable. Instead, the work continued without interruption, the drain was laid in the trench, and it was duly filled in. This was in the autumn of 1948. In May, 1949, the electricity supply carried by the cable failed, and it was discovered that water seeping through the damaged part of the cable had come into contact with the live wires and caused an explosion.

The Coal Board brought this action against the defendants claiming damages for trespass and negligence. Donovan J. held that there was no negligence, for the contractors were entitled to assume that there was nothing under the ground in the path of the proposed trench. It was argued that because of the proximity of the pylon they should have suspected the presence of the cable, but the learned judge held that they were not negligent in this respect. The pleadings did raise the point that there was negligence in not notifying the Coal Board when the excavator hit the cable, but this point was not pursued at the trial, and on the appeal it was held that it was not open for argument. In any case, as Cohen L.J. pointed out in the Court of Appeal, if there was such negligence, it was the negligence of the Council, not of the

contractors, for the latter did their duty by reporting the matter to the Council's clerk of works. Having dismissed the claim on the head of negligence, Donovan J. went on to hold the defendants liable in trespass. He considered that the defence of inevitable accident did not apply in this case, because the defendants intended to cut the trench where it was in fact cut, and the damage ensued not through some act over which they lacked all control, but simply because they did not appreciate what lay in the path of the proposed trench. This savours of the view held by Beven that loss of control would absolve a defendant from liability, but not if he had freely engaged in the activity in the course of which control was lost (see *Beven on Negligence*, 4th ed., Vol. I, p. 710). Mr. Gold, writing at some length in 21 Bell Yard p. 5 *et seq.*, has developed an even wider "control" theory, and the late Dr. Stallybrass appears to have subscribed to this view (see *Salmond's Law of Torts*, 10th ed., p. 24).

In the Court of Appeal, the trial judge's view that there was liability in trespass did not meet with approval, and the appeal was allowed, Cohen L.J. delivering the principal judgment, supported by Singleton and Morris L.JJ. Only four cases appear to have been discussed, and unfortunately it cannot be said that the treatment of any one of them is really satisfactory. The Master of the Rolls has recently explained how difficult it is for the Court of Appeal to devote adequate time to the consideration of the cases before that court, because of the "constant and exacting pressure" of business (see his published lecture on *The Court of Appeal in England*, 1950, Athlone Press). He admits that they do not reserve as many judgments as perhaps they should. It is suggested that the present case is one which has suffered as a result of this situation. Surely the Court of Appeal could have conducted a more adequate investigation of the relevant case law, even though they may not have wished to say anything fresh about the principle of the matter.

The first case considered was *Weaver* v. *Ward* (1616) Hob. 184, where a soldier who accidentally wounded another in musket practice was held liable in damages, and the report says that "no man shall be excused of a trespass . . . except it may be judged utterly without his fault." Denman J., in *Stanley* v. *Powell* [1891] 1 Q.B. 86 at p. 89, regarded this statement as a "summing up of the law applicable to cases of unintentional injury by acts which are prima facie trespasses," and in the present case the Court of Appeal were inclined to take the same view. They took the case to indicate, not that there is strict liability in trespass, which is what the plaintiffs contended, but that "where the defendant was entirely without fault, he would have a good defence to an action in trespass"—*per* Cohen L.J. at p. 814. Morris L.J. actually applied one of the illustrations of situations exempting a defendant from liability, given in *Weaver* v. *Ward*, to the facts of

the present case, notwithstanding that in *Dickenson* v. *Watson* (1682) T. Jones 205 facts similar to those in the illustration came before the court and the decision was in favour of liability. It seems of little avail that Sir Frederick Pollock should have pointed out that in *Weaver* v. *Ward* " the defendant's plea was held bad because it only denied intention, and did not properly bring before the Court the question whether the accident was inevitable " (*Pollock on Torts*, 14th ed., p. 112) or that Mr. Gold should have demonstrated that " the decision itself does not support the view that the defence (of accident) is tenable " (*loc. cit.* p. 16). The Court of Appeal is willing to use the dicta in this case to found a proposition despite the fact that it has been said that they " are too confusing to permit of their confident citation for any contention with respect to inevitable accident " (*ibid.* p. 17).

The second case was that of *Leame* v. *Bray* (1803) 3 East 593, where a statement made by Grose J. at p. 600 has been thought to imply that if the injury be done by the act of the defendant he is answerable in trespass even though it happens accidentally or by misfortune (*cf.* the " control " theory). It was argued that this applied in the present case, but this contention was very briefly swept aside by Cohen L.J. He pointed out that most of the early cases had been decided on points of procedure, and contained dicta which do not, if read literally, appear to have been approved or followed in any modern case. (This can no longer be said of the dicta in *Weaver* v. *Ward*.) In thus rejecting the argument based on *Leame* v. *Bray*, Cohen L.J. might have stated more specifically that what Grose J. said was really obiter because the case concerned the choice of the proper form of action (see Pollock, *op. cit.* p. 118, Gold, *loc. cit.* pp. 20, 21).

Next comes *Holmes* v. *Mather* (1875) L.R. 10 Ex. 261, the case where the defendant's horses ran away and knocked down the plaintiff in the highway, and it was held that there was no liability. There is some doubt as to whether Bramwell B. in this case, at p. 267, meant to limit the effect of his decision to accidents occurring on the highway. Pollock believed that he did (*op. cit.* p. 114), and he quoted in support of this view the judgments of the Exchequer Chamber in *Rylands* v. *Fletcher* (1866) L.R. 1 Ex. 265, at pp. 286, 287. See also Landon's references to Bramwell's judgment in the Court of Exchequer in the same case indicating that trespass is actionable whatever the defendant's state of mind (Landon in *Pollock on Torts*, 14th ed., p. 142). Although this view was urged before the Court of Appeal, Cohen L.J. could see " no logical reason for placing such a limit on the general observations of Bramwell B." and refused to accede to the argument, although he was careful to indicate that it was " not necessary to express a final conclusion on this point." He instanced in support of his view Denman J.'s use of the Bramwell quotation in *Stanley* v. *Powell*, which was not a case of accident on the highway. There is another controversial

passage in the judgment of Bramwell B., at pp. 268, 269, in which he dismissed most of the previous cases as irrelevant because they turned on the choice of the appropriate form of action, and in which he is said to have implied that accident is a good defence to trespass. Mr. Gold has argued that the learned Baron's interpretation of the previous case law is incorrect (*loc. cit.* p. 28), and Mr. Landon has contended that this passage is more accurately reported in *The Law Times Reports* and does not imply that accident is a defence in trespass (*op. cit.* p. 148). Nevertheless the Court of Appeal appears to accept without question *The Law Reports* version of Bramwell's remarks and the interpretation of the previous case law therein expressed, and uses the passage to support the view that accident is a defence in trespass.

Stanley v. *Powell* [1891] 1 Q.B. 86 is the last of the four cases to be considered. Notwithstanding the penetrating and trenchant criticism of the judgment of Denman J. which has been voiced by Messrs. Beven, Landon and Gold, and the doubts of others, this judgment is referred to with approval, respect and even admiration in the Court of Appeal, and its conclusions are accepted. There is no discussion of the case at any length. While it is not suggested that the result ought to have been different, it seems a pity that more time could not have been devoted to a careful review of the whole position before adding the weight of the Appeal Court's approval to what Mr. Landon has described (and can no longer describe) as "the sole decision supporting a departure from the fundamental Common Law doctrine."

Finally, the decision in *N. C. B.* v. *Evans* contains certain general remarks about the merits of the plaintiffs' case as against that of the defendants, and the absence of any fault on the part of the latter. These statements might be regarded as lending support to the view that there is no liability in tort without fault, so strongly advocated by Salmond, were it not for the fact that they may be attributed more correctly to the desire of the Court of Appeal to invoke the statement in *Weaver* v. *Ward* to the effect that "no man shall be excused of a trespass . . . except it may be judged utterly without his fault" and to apply it to the facts of the present case. The fault in this case lay in the first place with the colliery people, who laid the cable in a trespassory manner, and in the second place with the County Council, which failed to inform the Coal Board of the accident to the cable in the autumn of 1948. The N. C. B. could not have sued the Council since they were themselves in the position of trespassers with regard to the cable. *Ex turpi causa oritur non actio.* The case against the contractors would have been more satisfactorily disposed of could they have been regarded as standing in the same shoes as the County Council with regard to the availability of this defence. That the Court of Appeal was conscious of this aspect of the matter is evident from statements made by Morris and Cohen L.JJ. We

might then have been saved the rather unprofitable excursion into the realms of negligence and trespass upon which the two courts embarked.

J. E. HALL WILLIAMS.

THE NATURE OF TRESPASS

IN contrast to the decision in *N. C. B.* v. *Evans* (noted above) the following dictum of Asquith L.J. (as he then was) in *Conway* v. *George Wimpey* [1951] 2 K.B. 266 may be quoted: "It is elementary that if A, professedly acting on behalf of B, purports to give me leave to enter on B's land, and A has no actual authority to do so, I am a trespasser if I act on this permission: none the less so, because I do not know of A's want of authority" (at p. 274). Yet it is clear that the entrant is "utterly without fault."

The apparent conflict can, however, be resolved by examining the issues involved in these cases. In *Conway* v. *George Wimpey* the question was whether the employers of a van driver were liable to a stranger who had been injured, while on the van, by the driver's negligence. The driver had been expressly ordered not to give lifts to unauthorised persons, but the plaintiff was not aware of this fact. It was held that the defendants were not liable: they owed no duty to the plaintiff as he was a trespasser on the vehicle. The distinction between the two cases would seem to be this. In *N. C. B.* v. *Evans* it was held that the plaintiff had to show fault in the defendant. In *Conway* v. *George Wimpey* the plaintiff had to show that the defendants owed him a duty of care. This he could do by showing that he was a licensee. He could not establish such a duty by merely showing that he *thought* he was a licensee. Once it was held that he was not in fact a licensee, it really became unnecessary to hold that he was a trespasser. He was merely so classified because of the somewhat artificial nature of the categories into which the law divides entrants on other people's premises. After *N. C. B.* v. *Evans* it by no means follows that he was guilty of an actionable tort.

Although these two decisions are thus perfectly reconcilable, the wider problem—whether an innocent person can be a trespasser—remains. It is sometimes suggested that the answer to this problem depends on the type of trespass complained of. But after the approval of *Stanley* v. *Powell* [1891] 1 Q.B. 86 in *N. C. B.* v. *Evans* any distinction in this context between trespass to goods and trespass to the person is manifestly untenable. Nor, it is submitted, does trespass to land stand on a different footing. There seems to be no merit in the view that *Stanley* v. *Powell* would have been differently decided if the pellets from the defendant's gun had shattered the window-panes of a greenhouse.

It is submitted that the vital distinction is not in the kind of

trespass complained of but in the purpose for which the complaint is made. Trespass has two distinct aspects—a tortious aspect and a proprietary aspect. This is due to the well-known fact that English law has no purely proprietary action, and that trespass has been adapted to fill this gap in the law. The action of trespass now provides redress both for injury to person and belongings and also for interference with possession and hence with title. When trespass is considered in its tortious aspect, it is now clear that (subject to certain exceptions such as cattle trespass) fault is an essential element of liablity. When trespass is considered in its proprietary aspect, fault is immaterial. This is clearly essential for the protection of title to land. Equally, since conversion cannot be committed without denial of title, and since it is a defence to detinue that the defendant has lost the chattel without any default on his part, the action of trespass may still in certain cases be essential to ensure that the innocent act of A should not deprive B of his title to a chattel.

G. H. TREITEL.

TRADITIONALISM ASCENDANT

THE decision of the House of Lords in *British Movietonews, Ltd.* v. *London & District Cinemas, Ltd.* [1951] 2 All E.R. 617, reversing the judgment of the Court of Appeal, is one in which the dicta have a more permanent interest and importance than the *ratio decidendi*. The *ratio* turned on a simple point of construction.

Briefly, the facts were that, in 1941, the plaintiff film distributors agreed to supply news reels to the exhibitor defendants in an agreement expressly determinable by four weeks' notice on either side. In 1948, the decline in raw film stock necessitated the promulgation of the Cinematograph Film (Control) Order, under the Emergency Powers (Defence) Act, 1939, which had as its relevant purpose the maintenance of supplies and services essential to the " life " of the community. As a result of the order, the parties, in 1948, concluded a supplemental agreement, two parts in which proved ultimately vital in their litigation: namely, the recital, " Whereas by the Cinematograph Film (Control) Order, 1948, it has become necessary to restrict the consumption of raw film stock," and the clause, " The principal agreement shall remain in full force and effect until such time as the said Order is cancelled." After the war, the life of the 1948 Order was extended under the Supplies and Services (Transitional Powers) Act, 1945, which had as its relevant purpose the securing of supplies and services essential to the " wellbeing " of the community. Some time before the final revocation of the Order, the exhibitors sought to terminate the agreement by giving four weeks' notice. The distributors retaliated with an action for damages alleging breach of contract on the ground that withdrawal

by either side was expressly precluded so long as the 1948 Order endured.

The Court of Appeal held that the duration of the Order within the meaning of the contract depended on the relevant purpose of the 1939 parent Act, that is, the maintenance of raw film stock to preserve the " life " of the community; that the exhibitors entered into the supplemental agreement and submitted to war-time uniformity of news reels and a cessation of the normal business practice of competitive buying as part of the war effort; that as reasonable businessmen they contemplated the duration of the war emergency as the duration of the Order for the purpose of their contract; or, in other words, in 1948 businessmen contemplated peace bringing not a planned economy but business as usual. Hence, on the termination of the war purposes, the contract became terminable by four weeks' notice.

The House of Lords, on the other hand, considered that the duration of the Order for the purposes of the contract was governed by the recital, which the Court of Appeal had entirely ignored in its interpretation. As the parties had taken the trouble to specify the cause of their supplemental agreement in the narrow terms of the 1948 Order, they must be taken to have intended the supplemental agreement to bind without escape until it was no longer necessary to restrict the consumption of raw film stock. Hence, the distributors were entitled to their damages.

The dicta in the House referred to two important issues: the theoretical basis of the doctrine of frustration, and the nature of the judicial process involved in the interpretation of contractual terms ambiguous in themselves or by reason of circumstance.

The immense virtue of Denning L.J.'s judgment in the Court of Appeal lay in its explicit articulation of the movement of judicial discretion and policy in cases of frustration or contractual construction. Thus, with regard to the doctrine of frustration, Denning L.J. joined the small though distinguished division of the Judicial Committee of the Privy Council in *Hirgi Mulji* v. *Cheong Yue S.S. Co.* [1926] A.C. 509, 510, and Lord Wright in *Denny Scott & Dickson, Ltd.* v. *Frazer, Ltd.* [1944] 1 All E.R. 688, in asserting that, in such cases, " the court really exercises a qualifying power—a power to qualify the absolute, literal or wide terms of the contract in order to do what is just and reasonable in the new situation " ([1950] 2 All E.R. 895). The House of Lords, on the other hand, approved of the traditional implied term theory, which must now therefore be considered as having been stabilised, at least for the time being. Provided the courts continue, as they have done in the past, to ignore this " spurious fiction " in the actual application of the doctrine of frustration, no practical consequence will arise from cleaving to the traditional view, other perhaps than some hazing of clarity of thought. It may, however, be worth reiterating what others have so cogently put that a danger does arise if some future

bench were to take the fiction seriously. At such time, cases like *Tatem* v. *Gamboa* [1939] 1 K.B. 132, and *Constantine S.S., Ltd.* v. *Imperial Smelting Corp.* [1942] A.C. 154, will go the other way, adversely to the business considerations involved.

Again, in the matter of the interpretation of contracts in the light of particular circumstances, the House preferred, it seems, to regard the judicial process involved simply as a search for some objective " true," " just " or " proper " construction, or for the " presumed " common intention of the parties, or for some " necessary " implication from the circumstances. Denning L.J., on the other hand, frankly declared this process to take place within the area of judicial discretion and policy. It may be emphasised that the judicial discussion of policy and discretion does not increase the uncertainty of case law. By granting lawyers additional, vital information, it in fact increases the predictability of decisions, which lies at the root of certainty in case law. Not only for this reason but also for future legal development, it were a great pity if the area of judicial discretion and policy be kept in a condition of guarded secrecy, as though it were a mental Harwell. Beyond this consideration, however, judicial silence concerning the exercise of discretion and policy-motives does not matter a practical jot provided the judge appreciates the real task involved in the circumstantial interpretation of contracts, or has, in any case, a strong intuitive sense of justice. The danger arises only where a contract comes before a strict constructionist, who may produce an unjust result through sheer pedantry.

The validity of a strict doctrine of precedent such as we have, formally, at least, in this country today seems to me to rest substantially on the assumption that Parliament is always at hand to untie the knots to which logic, logical analogy and ageing conceptions may lead. In fact, at present, Parliament has not the time to perform such operations, at least for the details of substantive law, and there exists no other agency of continuous adjustment, like the Ministry of Justice most recently advocated in the publication, edited by Prof. Glanville Williams, *The Reform of the Law*. While the present position persists, it seems essential for some relaxation of *stare decisis* to be allowed in cases where the law does or may do manifest individual injustice, for the judiciary to regard the judicial function as larger and more creative than the mere use of the analogue alone and to avoid an attitude of opposition towards the needed reorientation of fundamental conceptions. It is because the House of Lords appears, on the surface at least, to have adhered to such an attitude and to the narrower view of the judicial function that the dicta expressed in the *British Movietonews Case* give cause for concern.

C. GRUNFELD.

Capacity to Marry in the Conflict of Laws

What is the relation of the Conflict of Laws to statute law? Does the statutory character of a law interfere with the normal functioning of the Conflict of Laws? Modern Conflicts of Laws prescribe whether the *lex fori* or a legal system foreign to the forum should be applied. The application of a rule of domestic law depends, therefore, upon prior consultation of the Conflict of Laws. If each rule of domestic law were itself to control its application by specific directions attached to it there would be no room left for any Conflict of Laws as an independent branch of law. To some this may appear a not uninviting prospect, yet it needs little reflection to understand that the Conflict of Laws, whatever its imperfections, offers the best means of consistent and orderly administration of justice, and there seems general agreement that this branch of law is a valuable, and indeed indispensable, part of any civilised modern legal system. There are, on the other hand, a growing number of statutory rules which themselves control their application in space.

As far as English law is concerned these enactments have been examined by Dr. Morris, who has shown that they have been as unsuccessful in practice as they are confusing in theory.[1] These parasitic legislative phenomena (Dr. Morris calls them "bastard hybrids") are fortunately few and it is to be hoped that their number will not be increased. The threat to the English Conflict of Laws constituted by them is as yet insignificant. But there is a great danger that the Conflict of Laws in this country will be almost completely swamped if all English statutes are considered as containing impliedly, if not expressly, *ad hoc* directions as to their area of operation. The measure of this danger is given by the inevitably growing proportion of statute law in the body of English Law as a whole.

It is therefore of vital importance that in the absence of express directions the application of English statutes should be derived from the Conflict of Laws and not from any *ad hoc* directions which are supposed to be implied in the statute itself. A decision reached by this faulty method may be the same as would follow from consultation of the Conflict of Laws. It is nevertheless of more than academic importance to reach a right decision by the correct method, and not by reasoning which at best shows little progress from the doctrine of the statutists and which at worst might undermine the whole fabric of the Conflict of Laws.

This is precisely what happened in the recent decision of Mr. Justice Pearce in *Pugh* v. *Pugh*.[2] The simple facts of this case were that a marriage had been concluded in Austria between a domiciled Englishman and a domiciled Hungarian girl, 15 years of

[1] "The Choice of Law Clause in Statutes" in 62 L.Q.R. 170.
[2] [1951] 2 All E.R. 680.

age. It was necessary to decide whether the validity of this marriage should be determined by Austrian or Hungarian Law, under which the marriage was, or had become, valid, or by the relevant provisions of English Law, namely, the Age of Marriage Act, 1929, s. 1 (1).[3] Instead of justifying the application of the Age of Marriage Act to the facts of this case by the well-established rule of English Conflict of Laws that capacity to marry is governed by the laws of the domicile of the parties, Mr. Justice Pearce reached this conclusion in the first place by "interpretation of the statute itself," so as to discover whether Parliament in enacting this statute could be taken to have intended that it should operate only territorially, or so as to affect capacity to marry "in all persons domiciled in the United Kingdom wherever the marriage might be celebrated."

The Conflict of Laws was then consulted and the conclusion reached in the first place as a matter of statutory interpretation was confirmed as in accord with the rules of Conflict of Laws. The Age of Marriage Act has been examined in relation to the Conflict of Laws by two authors, Sir Eric Beckett, whose article[4] alone was considered by Mr. Justice Pearce, and by Dr. Morris.[5] Both authors agree that this Act is one which, as distinct from such Acts as the Inheritance (Family Provision) Act, 1938, does not contain any *ad hoc* directions as to its area of operation. Sir Eric Beckett suspected that this matter had been overlooked when the Act was drafted. Dr. Morris says that the Age of Marriage Act is "a typical example of a statute without any choice of law clause," and, later on, that "we may be thankful that the draftsman of the Age of Marriage Act, 1929, did not plunge into these troubled waters." Unfortunately, the plunge was taken in the present case in order to find a solution readily available without this dangerous exercise. The admission of Mr. Justice Pearce that if he had remained in doubt as to the intention of the statute he would have been compelled to uphold the marriage, presumably, by applying the presumption in favour of marriage, demonstrates the risk of remaining submerged in the troubled waters of statutory interpretation. It is true that in the event the absurdity of upholding this marriage on the strength of a presumption in the teeth of the Conflict of Laws was avoided. This was done by attributing to the legislator an intention which he had not expressed because, probably, he had not formed it.

The filling of such gaps in the law is a familiar, though difficult, operation. It certainly should not be undertaken unless it is necessary. The silence of statutes on the question of their application in space does not create a gap in the law as long as there is the Conflict of Laws ready to provide the answer.

J. UNGER.

[3] Now, the Marriage Act, 1949, s. 2
[4] 15 B.Y.B.I.L. 46, at p. 64.
[5] *Supra.*

IN the decision in *Pugh* v. *Pugh* noted above, Pearce J. granted the wife's petition for nullity on two grounds, namely :—

1. that the provisions of the Age of Marriage Act, 1929, applied to the husband as a British subject with an English domicile, wherever he might marry, since the effect of that Act is extra-territorial and not confined to marriages in the United Kingdom; and

2. that the validity of the marriage must be tested by the law of the country of the husband's domicile, or alternatively by the law of the country of the proposed matrimonial home.

The first ground, which was plainly dominant, is a decision on the operation of the Act itself, which has already been commented upon. The second ground rests, however, on the application of a common law principle in the Conflict of Laws. The precedents followed throughout were those dealing with marriages within the prohibited degrees, which under the Marriage Act, 1835, were made absolutely void instead of, as previously, voidable only by sentence of the ecclesiastical court, pronounced during the lifetime of both the parties to the marriage. Thus all these cases were concerned with matters governed by a statute, and while many of the previous decisions were based on both grounds the reasoning in respect of each ground is not always easy to disentangle. But between these cases and *Pugh* v. *Pugh* there is an important difference : cases of prohibited degrees involve a pre-existing relationship between the parties of consanguinity or, more usually (since most of the cases concerned marriage with the surviving spouse of a deceased sister or brother), of affinity, whereas in *Pugh* v. *Pugh* the incapacity was peculiar to one party to the marriage alone. In the classic case of *Brook* v. *Brook*,[1] Cresswell J.[2] held that the marriage in Denmark of a domiciled Englishman and his deceased wife's sister would have been voidable on grounds of nationality and domicile before the Act of 1835 and that by force of the Act it was rendered void. But he also held[3] that the Act of 1835 attaches upon the persons of British subjects and accompanies them to all parts of the world. Stuart V.C.[4] relied mainly on the construction of the statute, though he gave[5] three grounds for the decision, namely : (1) that the public policy of England prohibits the contract, (2) that the law is personal in its nature and must accompany the persons wherever they go, and (3) that England was the country with a view to which, and in which, the marriage contract was to have its permanent effect. In the House of Lords, whilst Lord Cranworth and Lord St. Leonards based their decision on the statute as affecting the capacity to marry of English subjects

[1] (1858) 3 Sm. & G. 481; (1861) 9 H.L.Cas. 193.
[2] (1858) 3 Sm. & G. 514.
[3] At p. 522.
[4] At p. 525.
[5] At p. 532.

domiciled in England, Lord Campbell and Lord Wensleydale relied on the common law ground of domicile in England. Lord Campbell also said that the matrimonial residence was contemplated in England and both of their Lordships expressly gave it as their opinion that the Act of 1885 did not bind all English subjects wherever they might be; Lord Cranworth joined them in saying that the Act of 1885 did not affect any marriages which would not have been impeached by the previous common law rule.

In one respect the present decision that the Act of 1929 has extraterritorial operation is narrower than the decision on the basis of domicile, since on the latter ground the capacity to marry of any foreigner (including a non-Christian) who is domiciled in England would appear to be restricted as far as the age of either party is concerned. In the older cases such as *Brook* v. *Brook*,[1] there is still considerable confusion between the ideas of nationality and domicile, which were first clearly isolated in 1869.[6] Moreover, it would seem that the first submission made on behalf of the wife and accepted in *Pugh* v. *Pugh* gives that Act a wider operation than was accorded to the Marriage Act, 1885, in the decisions on prohibited degrees. Thus in *Brook* v. *Brook*[1] all the judges who decided the case on the grounds of the extraterritorial effect of the Act of 1885 restricted its operation to the persons of English subjects (with or without domicile in England); and in *Mette* v. *Mette*[7] this was extended to persons naturalised in England. But in *Pugh* v. *Pugh* the first submission on behalf of the wife was that the Act applied to the husband as a British subject with an English domicile. Since the Nationality Act, 1948, the concept of a British subject has become a derivative concept, which embraces citizens of the Dominions, including India, Pakistan and Ceylon; *a fortiori* it includes also non-Christian subjects of the United Kingdom and Colonies. The effect is to extend the operation of the 1929 Act to all such non-Christian persons who are domiciled in England, although by section 8 (2) of the Act itself it does not extend to Northern Ireland.

Moreover, Pearce J. in his judgment expressly adverted to the decision in *Mette* v. *Mette*[7] that the disability of either party to the marriage would invalidate it, and he quoted also the case of *Re Paine*[8] in which it was held that a woman domiciled in England had no capacity to marry in Germany the former husband of her deceased sister who was a German subject domiciled in Germany. The learned judge thus appears not to have intended to confine his decision to the domicile of the husband or of the intended matrimonial home as affecting the capacity to marry of both parties, but to have intended it to apply to invalidate the marriage where the domicile of either party affects capacity, as

[6] *Udny* v. *Udny*, 1 Sc. & Div. 441, 457.
[7] (1859) 1 Sw. & Tr. 416.
[8] [1940] Ch. 46.

where a woman who is a British subject with an English domicile marries anywhere and either party to the marriage is under 16. Thus if, for example, an Indian acquires an English domicile, and his daughter, whilst under the age of 16, and therefore having a domicile of dependence in England, returns to India to be married there, it would seem that the marriage is invalid in English law.

It is perhaps also worthy of note that, because of the extra-territorial effect given to the Acts of 1885 and 1929, the law governing the capacity to marry particular persons now differs substantially from the law relating to capacity to contract a particular kind of marriage. Thus it is now established, on the narrowest construction of the present decision, that an Englishman domiciled in England cannot anywhere marry a woman under 16; it seems also that an Englishwoman domiciled in England cannot anywhere marry a man under 16. But it has only recently been held* that if an Englishwoman domiciled in England contracts a polygamous marriage in Egypt, the English courts will refuse to declare the marriage invalid. If either party had been under 16 at the date of the marriage, would the court have assumed jurisdiction?

O. M. STONE.

MONOGAMOUS MARRIAGE—MOHAMMEDAN DIVORCE

IN *Maher* v. *Maher* [1951] 2 All E.R. 87, a Mohammedan, domiciled in Egypt, married a woman professing Christianity, domiciled in England, at an English registry office. The Mohammedan then returned to Egypt where, appearing with two witnesses before the Cairo Court of Personal Status, he declared that he had divorced his wife in the presence of the same two witnesses by saying: "My wife, Kathleen Mary Collet, is divorced from me by three divorces." He was thereupon given a document reciting these matters. The wife subsequently petitioned successfully for divorce in England on the ground of desertion, founding the jurisdiction of the court under the three years' residence clause of the Matrimonial Causes Act, 1950 (s. 18 (1) (*b*)). If the Egyptian divorce, which was certainly valid in Egypt, was entitled to be recognised in this country, the wife's petition would have failed *in limine*. To succeed she would have to overcome, in the words of Barnard J. who heard the case, "the established rule of English law that domicil is the true test of divorce jurisdiction," and the fact that "the courts of England will recognise as valid any divorce which is granted by the courts of the country where the parties are domiciled, even on a ground which is not a ground for a divorce in England."

The petitioner advanced three arguments to attack the Cairo

* *Risk* v. *Risk* [1951] P. 50.

decree: (1) that it was contrary to natural justice because she had no notice of the proceedings; (2) that the divorce was not effected by a court of law, a necessary requirement for its recognition in England; (3) that in any event a "Christian" marriage in the *Hyde* v. *Hyde* sense (1866) L.R. 1 P. & D. 130 could not be dissolved by a method appropriate to a polygamous union. In support of the first argument, the petitioner cited *Rudd* v. *Rudd* [1924] P. 72, and *Shaw* v. *Att.-Gen.* (1870) L.R. 2 P. & D. 156. Barnard J. thought that in both these cases the English court had acted not so much on the ground of want of notice as on the absence of jurisdiction in the foreign court to make the decree in question. The learned judge concluded, without in fact deciding the case before him on this point, that the question of service is a matter for the court which hears the case, provided that it has jurisdiction. It is not without interest to note that the Scottish courts have taken a different view of *Rudd* v. *Rudd*: see *Scott* v. *Scott* 1937 S.L.T. 682, following *Crabtree* v. *Crabtree* 1929 S.L.T. 675 and *Rudd* v. *Rudd*, where a foreign judgment was said to be opposed to natural justice "not only where, as here, the foreign court had not competent jurisdiction, but also where there has been, as here, ignorance of the dependence of the suit and a want of notice to the party affected by the foreign judgment. . . . It is well settled that either 'want of jurisdiction' or 'want of due notice' is by itself sufficient to establish the condition of being contrary to natural justice." And, with respect, to the same effect would seem to be *Shaw* v. *Att.-Gen.* at p. 162 (last sentence but one). See also *Colliss* v. *Hector* (1875) 19 Eq. 334; Falconbridge, *Conflict of Laws*, p. 666, referring to the Ontario cases *Delaporte* v. *Delaporte* [1927] 4 D.L.R. 988 and *Bavin* v. *Bavin* [1939] 3 D.L.R. 328, where the question of judgment obtained by fraud is intermingled. Barnard J. was contemplating substituted service when he expressed his view, not the case where, as in *Maher* v. *Maher*, there was no service at all: *cf. Dobson* v. *Festi* [1891] 2 Q.B. 92 at p. 95: "It would be monstrous to allow a plaintiff, after serving only one member of a foreign firm, to obtain by default a judgment which would bind all the partners. They might be resident in other parts of the world, and have no opportunity of defending themselves." A case of no service at all would seem to be equally "monstrous"; an English court should have certain minimum standards of procedure which it insists shall be recognised if a foreign decree is to be recognised in England, see *Shaw* v. *Att.-Gen.*, *loc. cit.* But, as stated, *Maher* v. *Maher* was not decided on this ground: see now, however, *Igra* v. *Igra* [1951] 2 T.L.R. 670, 678.

On the second point taken, Barnard J. held that the Cairo document was "nothing more nor less than the registration of a divorce." As there were "no divorce proceedings, . . . no amount of notice would have enabled the petitioner to have contested the respondent's unilateral declaration of divorce." Later references, with

approval, of the learned judge to *R.* v. *Hammersmith* [1917] 1 K.B. 684, and to *Warrender* v. *Warrender* (1835) 2 Cl. & Fin. 488, where effective bilateral "agreements" for divorce made out of court are condemned, show that in his view no proceedings "without judicial proceeding at all" can be recognised in England. Barnard J. was not asked to consider *Sasson* v. *Sasson* [1924] A.C. 1007, where two British subjects who were Jews domiciled in Egypt obtained a divorce, by delivery of a letter (*gett*), before the Grand Rabbinat in Alexandria. The Privy Council held that this bill of divorcement, though not given by a court of law, was entitled to recognition by the British Consular Court in Egypt. "Now the Court of the domicile here could not grant divorce, but on the other hand it was bound . . . to acknowledge the validity of a divorce according to the religious law of the non-Christian subject. The situation seems identical with that which has often arisen in India. Divorce by means of the phrase known as 'talak' is not a ground which would be good by English law. None the less the British courts have often given effect to Mohammedan divorces. . . ." It may be noted: (1) The reference in *Sasson* is to "British" not to English courts, the Privy Council not in that case acting as an English court; but it may be queried whether this is a valid distinction. (2) In the *Hammersmith Case* the bill of divorce was sent from an address in England; in *Maher* there was no communication with the wife, and the whole transaction took place in Egypt. (3) It seems, in any event, that *Sasson* concerned a monogamous marriage, as did the *Hammersmith* and *Maher Cases*, but the dictum of the Privy Council would seem to be capable of including polygamous marriages. (4) It would seem, leaving aside the issues of service and natural justice, that if Mr. Maher had married, no matter where or whom, after the time of the Cairo divorce and before the wife's English decree, he could have been convicted in England of the crime of bigamy. (5) A. T. Lawrence J. gave as an additional reason for the *Hammersmith* decision that "it was contrary to natural justice that a man should be judge in his own cause and determine his marriage at his own will and pleasure" (see Beale's approval, *Conflict of Laws*, 2, 703). *Sasson* seems to be distinguishable on this ground, whereas *Maher* falls within it. Doubtless many further distinctions may be drawn, but it would seem, though the decisions are the other way, that the fact that a divorce is not obtained in a court of law is of less importance than the fact that it is bilateral, or, possibly, unilateral.

On the last argument, that a Christian marriage cannot be dissolved by a method appropriate to a polygamous union, Barnard J. observed: "To hold otherwise would not only be contrary to the law as I understand it, but would both encourage and sanction the purely temporary unions of Englishwomen and foreigners professing the Mohammedan religion, during their limited residence

in this country." With respect, it seems drastic in view of the divorce laws pertaining, for example, in some of the states of the United States (if one must go far away from home), to limit this observation to Mohammedans. Marriages such as that in *Maher* are usually entered into with some knowledge of the risk involved.

Denning L.J. would probably have granted the wife in *Maher* a nullity decree, not a divorce; see *Kenward* v. *Kenward* [1950] 2 All E.R. 297, at p. 310: "When an Englishwoman marries a man of a polygamous race at a registry office in England, the substantial validity of the marriage as well as its formal validity depends on the personal law of the wife and not on the personal law of the husband. It is a condition of the marriage that it should be monogamous." So, if the husband took a second wife in his own homeland, "that condition was broken and the marriage was voidable at (the English wife's) instance in our courts for failure of the consideration. She should get a decree of nullity." Under this reasoning, the Cairo divorce in *Maher* was clearly a breach of condition. It has been doubted, however, whether there is authority for the proposition advanced by Denning L.J., see 14 M.L.R. p. 77 *et seq.*

There is, finally, an interesting situation which may arise one day for clarification by the English courts. The facts would be more or less the same as in *Sasson*, except that the wife would have come to England prior to the delivery of the *gett* (in Jewish religious law it seems that the husband is not allowed to deliver the *gett* until the substantive case has been argued out before the Rabbinical authorities, and approval for his divorce given). In France, where such a situation has arisen, the courts, despite the fact that marriage and divorce are secular there, have declined, in somewhat extraordinary circumstances, to refuse recognition to the delivery; but they seem to have been overwhelmingly influenced by the fact that the case came before them at the instance not of the parties but of the mother of the second wife in the case, this mother it seems having acquired an acute disinclination to retain her newly acquired son-in-law. But there is a considerable French literature on this and allied subjects; see *Dame G.* v. *S.* (1949), reported 39 Rev.Crit. de Droit Int. Privé (1950) p. 57, with comment, pp. 58–62, by Y. Loussouarn: *cf.* "Divorce in Jewish Law," S. Daiches, 8 Jo.Comp.Leg. (1926).

JOSEPH JACKSON.

THE MEASURE OF DAMAGES IN FOREIGN TORTS

WHILST travelling in France, Lotte Kohnke, a woman resident in England, received severe personal injuries when a lorry driven by a Frenchman, Mahieu, collided with the car in which she was being driven by her employer, Karger. Mahieu was later prosecuted in

a French Correctional Court and found guilty of causing personal injuries by negligence to Karger and Mrs. Kohnke, both of whom, in accordance with French procedure, claimed in these criminal proceedings for damages in respect of their personal injuries. Substantial sums were awarded to each and, in connection with these civil claims, the French Court of Appeal apportioned two-thirds of the responsibility for the accident to Mahieu and one-third to Karger. After Mahieu and his employers had paid the damages awarded to Mrs. Kohnke they called on Karger to reimburse them one-third of the amount, and he did so.

In the meantime, however, Mrs. Kohnke had instituted proceedings against Karger in England, where they were both resident, and in due course the case of *Kohnke* v. *Karger*[1] came before Lynskey J. Since the parties differed from those in the French proceedings, which had in the meantime been completed, there was no question of *res judicata*, but the defence contended that the plaintiff had already received compensation for her injuries and was not entitled to double satisfaction, since "a satisfied judgment for a single damnum is a bar to another action for the same damnum based on any injuria causing that damnum."

This is clearly the position in respect of a satisfied judgment of an English court, but there was no clear authority where the judgment satisfied was that of a foreign court. Both *Barber* v. *Lamb*[2] and *Taylor* v. *Hollard*,[3] which were cited, were actions between the same parties for the same debt based on the same cause of action. In *Barber* v. *Lamb* the plaintiff, having sued in the Consular Court at Constantinople for £1,000, obtained judgment for £45, which was satisfied, and it was held that he could not then sue in England for the £1,000. *Taylor* v. *Hollard* went considerably further. The plaintiff had obtained a judgment in England for over £15,000 on a contract of loan and brought an action on the English judgment in a court of the Transvaal, where the defendant was domiciled. The Transvaal court refused to enforce the English judgment in full, holding the contract on which it was based to be usurious and unconscionable, but gave judgment for the plaintiff for nearly £10,000. The plaintiff eventually recovered this amount by sequestration in South Africa, and then sued in England for the balance of the original English judgment and interest. Jelf J. held, *inter alia*, that he was barred, not by the mere judgment in the Transvaal, but by the fact that, having proceeded to sequestration and accepted satisfaction of the judgment for the smaller amount, he had shown his acceptance of it.

In the present case the plaintiff had undertaken to give credit to the defendant for damages she had obtained against Mahieu, and Lynskey J. indicated that in any event he would have held

[1] [1951] 2 T.L.R. 40; [1951] 2 All E.R. 180.
[2] (1860) 8 C.B. (N.S.) 95.
[3] [1902] 1 K.B. 676.

that her damages against Karger must be reduced by the amount she had received as a result of the French proceedings, but he went on to say: "her election of one tribunal to deal with her claim against Mahieu and his employers, even when she obtains judgment which is satisfied, will not avail Karger except to the extent that her damages have been in part satisfied by money recovered from Mahieu." The distinction from *Taylor* v. *Hollard* was, of course, the fact that here different parties were concerned.

The question at issue was therefore whether the plaintiff had a valid claim against the defendant for which no satisfaction had yet been received, and on this Lynskey J. said: "The principles on which damages are assessed differ in different countries, but in assessing damages I must apply the law and practice of these courts"; he then assessed damages in accordance with English law and indicated three divergences from the assessment in the French courts. These were:

(i) When the French courts assess damages in a claim grafted on to penal proceedings for causing personal injuries by negligence, the claimant cannot recover for damage to property, *e.g.*, for the loss of a wrist watch.

(ii) As a claim can subsequently be made in France for aggravation of injuries, the risk of such aggravation presumably is not taken into account in assessing the damages, whereas in England damages are assessed once and for all.

(iii) In the French courts the general damages vary according to the social position of the injured person, apart from loss of earning capacity.

As to (i), no evidence appears to have been offered of French law on damage to property, or whether Mrs. Kohnke could have recovered for such damage in any French court other than that in which she had already made her claim. In the absence of evidence to the contrary, the presumption is that foreign law is the same as English. Thus any small damages awarded on this score were rightly given in the English proceedings.

But as regards headings (ii) and (iii), Lynskey J. appears to have awarded in the English action damages which, under French law, would not have been recoverable either (for (ii)) immediately, or (for (iii)) at all, although there can be no doubt that a French tort was involved. No authorities were quoted for Lynskey J.'s proposition that damages must be assessed according to English law; but it seems that he was applying the rule in *Machado* v. *Fontes*,[4] in which damages were awarded in England for the publication in Brazil of a libel for which no damages could have been recovered there, although publication was an offence. In that case Lopes J. said: "directly the right of action is established in this

[4] [1897] 2 Q.B. (C.A.) 231.

country . . . the ordinary incidents of that action and the appropriate remedies ensue. Therefore, in this case, . . . damages would flow from the wrong committed just as they would in any action brought in respect of a libel published in this country." This doctrine, under which the law of the forum modifies the substance of the foreign tort, and the extension of it by which the law of the forum decides the measure of damages even where the law of the tort gives a remedy of the same nature, has been extensively attacked.[5] It has been described,[6] *inter alia*, as " at glaring variance with the policy . . . that a plaintiff should not be given an undue advantage by a fortunate choice of a forum." In this case there was added an undue disadvantage to the defendant, who had been adjudged only one-third responsible for the accident, but was made solely responsible for damages recoverable by English but not by French law, with little hope of obtaining any contribution from a tortfeasor not amenable to the jurisdiction of the English courts.

O. M. Stone.

Pre-Trial Publicity

In some European countries there is no check upon newspaper comment pending trial. We in England pride ourselves upon a different rule, but *R.* v. *Armstrong* [1951] 2 All E.R. 219 draws attention once again to a serious limitation upon it. The accused, charged with larceny, applied to the justices for bail, and on that application his previous convictions were disclosed. Local newspapers reported—even, it was suggested, misreported—these previous convictions. The Court of Criminal Appeal, while expressing the view that it was very undesirable that such information should be published, refused to quash a subsequent conviction.

There are few points of law reform on which there is greater unanimity of opinion than that publicity of preliminary proceedings should be curtailed. Quite apart from the possibility of disclosure of previous convictions, as occurred in the instant case, it is frequent for the accused to reserve his defence, and the publication of the evidence for the Crown thus tends to give a one-sided impression of the facts of the case. Hence it has frequently been suggested that where the accused is committed for trial there should be no report allowed except the charge and the name of the accused. A proposal of this type had the support of Sir Tindal Atkinson (the D.P.P.) and Sir Archibald Bodkin at the Departmental Committee on Coroners in 1935, and it was again put forward by the Chief Clerk of Bow Street Magistrates' Court, Mr. Albert Lieck, in his book, *Bow Street World*, pp. 187–8, and by Dr. C. K. Allen in

[5] See Dicey's *Conflict of Laws*, 6th ed., pp. 801–2, notes 14 and 22, and especially G. C. Cheshire, *Private International Law*, 2nd ed., pp. 304–8, M. Hancock, 22 Can. Bar Review 858, and A. H. Robertson, 4 M.L.R. 27.

[6] 22 Can. Bar Review 858.

a letter to *The Times*, April 21, 1949. Well-known examples of prejudice being caused by the present system are the Rutherford trial of 1919 (see E. S. Fay, *The Life of Mr. Justice Swift*, p. 44) and the Rouse trial of 1931 (see G. de C. Parmiter, *Reasonable Doubt*, p. 58). In Scotland the problem does not arise because there is no preliminary hearing, and no coroner's inquest. See Lord Normand in (1938) 54 L.Q.R. 345. A radical school of thought would have us follow the Scottish example: see Kenny, *Outlines*, 15th ed., pp. 539–40; Mullins, *Fifteen Years' Hard Labour*, pp. 70ff. This seems to be going too far (cp. Orfield, *Criminal Procedure from Arrest to Appeal*, 61, 72–5, 96–100), though there is surely much to be said for abolishing the coroner. Let us agree, at any rate, on turning the preliminary examination into a hearing in camera. And here the would-be reformer can bring out his trump card: to ask for legislation in England is to cry for the moon, but this particular reform could be effected by a simple recommendation from the Lord Chancellor: see Indictable Offences Act, 1848, s. 19.

GLANVILLE WILLIAMS.

DISCRETION OF SPECIAL JUDGE ON PATENT MATTERS—APPEAL

IN *Sageb's Claim* (1951) 68 R.P.C. 78, Mr. Justice Lloyd-Jacob, the special judge dealing with patent matters, had refused to order a preliminary point to be determined under Ord. 25, r. 2, in advance of the hearing on the general issue and had also refused to order the striking out under Ord. 19, r. 27, of certain allegations in the Statement of Claim as irrelevant and embarrassing. The Court of Appeal upheld this ruling by Lloyd-Jacob J. on the ground that it was justified on the facts and the points of law involved, and stated that the Court of Appeal would not lightly interfere with the discretion of the trial judge on procedural matters of this nature. So far the decision of the lower court and the Court of Appeal in *Sageb's Case* are in accordance with precedent and contain nothing novel. The Court of Appeal, however goes on to say that "now Parliament in its wisdom has decided that a patent judge should deal with these matters," the Appeal Court should hesitate even longer before interfering with discretion of that judge on a matter of procedure in a patent case. This is a dangerous doctrine. It is evidently most desirable that the Court of Appeal should generally be very careful before interfering with the discretion of any trial judge on a matter of procedure and in the particular case the decision of Lloyd-Jacob J. was perfectly correct. It is, however, submitted that the Court of Appeal would fail in its function to correct errors by the trial judge in patent matters if it takes the attitude that this judge, being a special judge, knows these matters

better any way, while the appeal judges—not being specialists—have not got the requisite knowledge.

The appointment of the special judge to deal with patent matters, which was recommended by the Patent Law Reform Committee, is a great step forward towards the proper and expeditious decision of patent cases, although the Lord Justice of the Appeal Court when referring to the "wisdom of Parliament" seems to doubt this. Incidentally, section 49 of the Patents and Designs Act, 1949, under which the judge is appointed, merely provides that "the number of puisne judges of the High Court . . . shall be increased by one"; the Act states neither that he shall be a specialist in patent matters nor that all patent infringement cases shall be tried by him. It is only by inference from the recommendations of the Patent Law Reform Committee and the fact that such an appointment is ordered by the Patents Act that the conclusion can be drawn that he should be a special judge for patent matters. Be that as it may, it certainly does not follow that because he is a special judge Parliament desired the Court of Appeal to interfere less with his discretion than with the discretion of any other judge. Indeed, just because he is a special judge and all patent cases are centralised in his hands, the danger is all the greater that once he selects the wrong groove he drives deeper and deeper into it and must be directed back to the right road by a higher court. In this connection it is interesting to note that the Court of Appeal, while upholding the tenor of the decision of the patent judge in *Sageb's Case*, expressed difficulty in understanding his *ratio decidendi*. All this shows that control by the Court of Appeal over the discretion of the special patent judge is just as necessary, if not more necessary, than over the discretion of any ordinary trial judge.

P. Meinhardt.

Austrian Nationality

In the *Matter of Mangold's Patent* (1951) 68 R.P.C. 1, Lloyd-Jacob J. had to deal with an application for extension of a patent on the ground of loss suffered "by reason of hostilities between His Majesty and any foreign state." Under section 24 (8) of the Patents Act, 1949, if the applicant "is a subject of such foreign state," no order for extension can be made. The learned judge held that the applicant who was of Austrian origin and had resided in this country since 1937, was disentitled to an extension, because on March 18, 1938, Austria was annexed by Germany and, on April 2, 1938, such annexation was recognised by His Majesty; consequently, the applicant was a German subject, unless he could prove that "by German municipal law" he was not so regarded. The recognition of Austria as a State on January 5, 1946, and the termination of the state of war with Austria on September 16, 1947,

were held to be irrelevant on the ground that the latter did "not necessarily imply the existence of any state of war between His Majesty and the State of Austria prior to such recognition."

It would be beyond the scope of these comments to discuss the difficult question how, in international law, the recognition in 1946 affected the character of the events in 1938, if recognition was then granted to them by His Majesty. It must suffice to draw attention to some of the narrower grounds making the decision noteworthy. In the first place, it again illustrates the working of the principle of precedent, for it was arrived at in ignorance of the decision in the *Matter of Application for Patents by A. B.* (1944) 61 R.P.C. 89. In that case Morton J. (as he then was) held that in view of certain statements made from time to time by Ministers in Parliament, Austria had to be regarded as being in existence and as a country for which Great Britain had drawn the sword, and that, therefore, it was open to the then applicant to describe himself as being "of Austrian nationality," his actual nationality not falling to be decided. Moreover, Lloyd-Jacob J. proceeded from the assumption that in 1938 this country had in fact recognised the annexation of Austria, although it was declared "null and void" by the Declaration of Moscow of October 30, 1943, and although for this among other reasons the effect of such recognition as this country ever granted to the annexation is not free from doubt: see Lauterpacht, *Recognition in International Law* (1947), pp. 399, 400. Again Lloyd-Jacob J. was not made aware of the strongly supported view that, in the absence of submission to the new sovereign, an Austrian who in March 1938 resided outside Austria, became stateless: *United States, ex. rel. Schwarzkopf* v. *Uhl* (1948) 137 F. 2d 898, A.D. 1948–1945 No. 54, and *cf. Murray* v. *Parkes* [1942] 2 K.B. 128 as explained in *Effects of Changes of Sovereignty upon Nationality*, (1942) 5 M.L.R. 218. Lastly, however, the most serious aspect of the decision is to be found in the fact that it involved matters of State of great international significance and far-reaching repercussions, which were decided without reference to the Foreign Office, though according to well-established rules it clearly ought to have been consulted. The gravity of the omission is emphasised by the fact that another Department of the Crown, *viz.*, the Board of Trade, was represented by counsel and apparently opposed the application. Thus fuel is added to the fire of those who feel that, for the sake of this country's reputation, in matters international some method must be found to ensure the proper instruction of the court on the facts and the law. There is a body of opinion that favours the adoption of the American practice requiring all "political questions" to be decided by the executive. Even those who are critical of that practice, or at least of certain of its consequences and ramifications, must admit the need for reform. In the present case it would perhaps be an appropriate gesture if the Crown, whose Board of Trade ought to have known better,

made arrangements for an elaborately argued reconsideration of the question and thus anticipated Austrian initiative in the courts or on a diplomatic level.

F. A. MANN.

ANGLO-IRANIAN OIL COMPANY CASE

(Interim Measures of Protection) (1951) I.C.J. Reports 1951, p. 89.

ON May 26, 1951, the United Kingdom had referred to the International Court of Justice its dispute with the Government of Iran concerning the " nationalisation " of the Anglo-Iranian Oil Company. When so doing it had reserved the right to request the Court to indicate interim measures of protection should that become necessary. On June 22, 1951, the United Kingdom, invoking article 41 of the Court's Statute, authorising the Court " to indicate any provisional measures which ought to be taken to preserve the respective rights of either party," filed a request for such interim measures to be indicated.

Interim measures may be compared with the municipal injunction, and become necessary if either of the parties is about to take action which would cause irreparable damage to the other, for example, would take some action which could not be corrected by the payment of monetary compensation, or which would aggravate the dispute. As is well known, the dispute between Great Britain and Iran relates to the expropriation of the oil company by the Iranian Government. The last thing desired by the United Kingdom was compensation, while restitution would certainly not be granted by the Iranian authorities. The purpose of the British application was to prevent the execution of the Iranian nationalisation law and to secure preservation of the *status quo* with the company exercising its rights under the 1933 agreement until such time as the Court decided whether or not Iran was legally entitled to nationalise the company. If, in the final result, the Court decided that Iran was not so entitled, not to award the measures of protection requested would mean that the company would be adversely affected in the meantime to such an extent that it could not be placed again into the position to which the Court would ultimately have considered it entitled.

The Permanent Court of International Justice had demonstrated the nature of interim measures of protection in the case concerning the *Electricity Company of Sofia* (1939). It had then said that the purpose of such measures was to uphold a " principle universally accepted by international tribunals . . . to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute." This principle had

been carried into effect by the Permanent Court in 1927 in a case which very closely resembled the dispute between the United Kingdom and Iran. In the case of the *Denunciation of the Sino-Belgian Treaty* the Court was faced with a request from Belgium for interim measures to prevent China from carrying out the threatened denunciation. The Court said that "in the event of an infraction—a contingency rendered possible by the situation resulting from the publication of the aforesaid Chinese Presidential Order—of certain of the rights which Belgium or her nationals would possess in China if the Treaty of November 2, 1865, were recognised as still operative, such infraction could not be made good simply by the payment of an indemnity or by compensation or restitution in some other material form." It requires only slight alteration of this quotation to make it apply to the Anglo-Iranian oil dispute.

Iran refused to appear and maintained in a communication to the Court that it should not award interim protection because the issue was not one which Great Britain could refer to the court. Rightly, the Court pointed out that this contention related to the merits of the dispute itself and should not be allowed to interfere with a claim for interim protection. Such measures would only have a standstill effect. If the final decision, either on the jurisdiction or merits, were in favour of Iran the latter would not suffer in any way by the delay. If, however, it were in favour of Great Britain, to refuse to consider the application for temporary measures would result in that country suffering severe loss.

The Court pointed out that the British Government alleged a violation of international law by the breach of the concession and by a denial of justice resulting from the Iranian refusal to submit the matter to arbitration in accordance with the 1933 agreement. For these reasons the Court held that "it cannot be accepted *a priori* that a claim based on such a complaint falls completely outside the scope of international jurisdiction," and considered itself competent to entertain the request, regardless of the Iranian refusal to appear to contest it. In so doing the Court explained that its decision in no way prejudged the ultimate question of the Court's jurisdiction which Iran would be able to attack at the hearing on the merits. The Court considered that provisional measures were necessary to preserve the rights which might subsequently be adjudged to either party by the Court.

The interim measures indicated by the Court were intended to preserve the *status quo* as it existed prior to the enactment of the Iranian nationalisation decree, and, in order to ensure that nothing was done by the company which might prejudice the rights of Iran should that State be successful at the hearing on the merits, a Board of Supervision was to be established by the two countries acting together. Judges Winiarski (Poland) and Badawi Pasha (Egypt) dissented from the Court's judgment. They could not agree that, in case of doubt, jurisdiction should be presumed. They were of

opinion that the Court should summarily have considered this point, and they felt that had it done so it would have reached the provisional conclusion that it did not possess jurisdiction.

By Article 41 of its Statute the Court is required to report the interim measures it has recommended to the Security Council, and by Article 94 of the Charter the party which has been successful in proceedings may have recourse to the Security Council if the other party fails to carry out the judgment. Iran refused to recognise the interim order, and denounced its acceptance of the compulsory jurisdiction of the court under the "Optional Clause." Nevertheless, at first Great Britain satisfied herself by merely declaring that the Iranian refusal amounted to a further breach of international law. Later, Great Britain referred the Iranian refusal to the Security Council only to receive a rebuff from that body which refused to do anything in the matter.

REVIEWS

ADDINGTON, AUTHOR OF THE MODERN INCOME TAX. By A. FARNSWORTH, LL.D., PH.D. [Stevens & Sons, Ltd. xii and 140 pp. 21s.]

In this interesting work, Dr. Farnsworth publishes the results of some of his recent researches into the early history of income tax in the United Kingdom. He observes that several historians, including some who have dealt in detail with the period and personalities involved, have regarded William Pitt as the financial genius to whose inventive mind we owe our system of income tax, and his contemporary Henry Addington, who was Prime Minister and Chancellor of the Exchequer from 1801 to 1804, has equally been looked upon as incompetent in financial matters and as having contributed little or nothing of merit to the system of taxation and the conduct of the nation's finances, but rather brought them near ruin. Dr. Farnsworth has had access to Henry Addington's personal papers, surviving in the hands of the present Viscount Sidmouth, which appear not to have been previously drawn upon by historians in dealing with the financial history of these times, and his book contains an enlightening account of the early history of income tax from its inception in 1799 until 1806 based entirely upon original contemporary documents.

He shows that Pitt in his Acts of 1799 first introduced the idea of a general tax on income of every form. Pitt's scheme was, however, too idealised to work well particularly as such a tax was novel and received with great hostility. This tax was at the rate of two shillings in the pound upon the aggregate income of each person after deduction of any annual interest upon his debts, any annuities payable by him and any allowances made by him to relatives. Pitt considered, apparently rightly, that public prejudice would not allow him to require detailed returns of income, in particular ones revealing the extent of the indebtedness of the taxpayer. Accordingly his Acts provided that each person should make a return to Commissioners declaring his willingness to pay a sum specified by him and certifying that sum to be not less than one-tenth of his income calculated in accordance with the rules and after making the deductions allowed in the Acts. If the Commissioners had reason to believe such a return inaccurate or fraudulent they were empowered to call for a detailed return, but in practice although a large proportion of the returns understated income the Commissioners were reluctant to call for these detailed returns except where there were demonstrable grounds for doubt. In any event fictitious debts bearing interest were readily invented by taxpayers who could not be compelled to disclose the identity of their supposed creditors

Addington succeeded Pitt in March, 1801. Shortly after he entered into office, the Peace of Amiens brought a temporary respite in the war with France, and in Addington's first budget in the spring of 1802 he announced his intention of repealing the income tax. The tax which he reintroduced on the renewal of the war in May of the following year was founded on a much more effective principle. This was the principle that wherever possible tax should be collected and deducted by the person paying the income. It was a principle found in the Land Tax, which in its inception in 1692 was a form of income tax upon certain kinds of income, not only income from land. The language of some of the provisions of the Income Tax Act, 1918, is, in consequence, virtually the same as that of the seventeenth-century Acts imposing that tax.

Addington introduced the division of income into Schedules A to E and the six Cases of Schedule D with which we are familiar today, and wished to

apply deduction at source to income from land, interest, dividends, governmental offices and pensions. This accounted then and in 1919 for about 70 per cent. of the income charged with tax. Deduction at source avoided requiring a return of any income except those forms not so taxed, or of interest on debts, since the taxpayer obtained relief on account of such outgoings by keeping the tax he had deducted in paying them. Owing to Pitt's opposition, Addington was compelled to abandon the taxation at source of income from the funds, but this was made lawful in 1806. His Act of 1803 has been the model for the main provisions of all subsequent income tax legislation, including the Income Tax Act, 1918, and the Consolidating Bill now before Parliament. Its language has, some would say unfortunately, been copied with but little variation. Dr. Farnsworth shows that Addington's scheme produced a yield almost as large as Pitt's though with half the rate of tax. It was adopted with only minor changes by Pitt himself in his Act of 1806. Other countries have found that without a system of deduction at source there is, even at the present day, much evasion of income tax upon, for instance, company dividends.

It is to be hoped that Dr. Farnsworth will be rewarded by the absence from future literature of misattributions, such as those he quotes, of the 1803 Act to Pitt or its scheme to Pitt's 1805 Act.

P W. E. T.

INTERNATIONAL LAW AND HUMAN RIGHTS. By H. LAUTERPACHT. [London: Stevens. 1950. xvi and 475 pp. £2 10s. net.]

THE two main objects of Professor Lauterpacht's book are clearly indicated at the outset. The first is the "exposition of the existing law, as enshrined in the Charter of the United Nations, relating to the international recognition and protection of human rights and fundamental freedoms. The second is the consideration of the problems arising out of the proposals made for the extension of the existing law, . . . through the adoption of an International Bill of the Rights of Man."

But the real clue to the whole work is probably to be found in another passage in the book, where the author expresses the view that: "It is not likely that the gradual integration of international society in the direction of a supranational Federation of the World—a development which must be regarded as the ultimate rational postulate of the political organisation of man—will be achieved by sudden and drastic changes in the legal organisation of mankind. But it may be brought nearer to realisation by the gradual adoption of the fundamental principles of a federal government. Of these, the direct subordination of the individual to federal law, in his capacity as a subject of the law of the Federation, is a vital link. Here lies the deeper significance of the affirmation of the principle that the individual is a subject of international law in the domain both of rights and of duties" (p. 46). The author believes that the "idea of an all-embracing Federation of States must be regarded not as an infinite ideal but as an object of a moral duty of positive action and as a practical standard of human endeavour" (p. 456).

It seems, therefore, that there is for the learned author a moral duty to advance the idea of a world federation. The discussion of the problems of international protection of human rights and especially the "affirmation of the principle that the individual is a subject of international law" are but steps towards that goal (*cf.* pp. 462–8).

Such an approach appears to have a definite influence upon the author's "exposition of the existing law." Thus the author, with great learning and ingenuity, puts forth the view that "having regard to the inherent purposes of international law, of which the individual is the ultimate unit, he is in that capacity a subject of international law" (p. 61); that, furthermore, "the

Charter of the United Nations, in recognising the fundamental human rights and freedoms, has to that extent constituted individuals subjects of the law of nations" (*ibid.*; see also pp 88–5, 159–60); that the word "intervene" in Article 2 (7) of the Charter, which prevents the United Nations from intervening "in matters which are essentially within the domestic jurisdiction of any State" implies only "coercive intervention" (p. 180); and that "the legal duty [in the Charter of the United Nations] to promote respect for human rights includes the legal duty to respect them It comprises, in addition, the obligation to further the adoption of means and establishment of agencies for the effective international enforcement of these rights," even though the Charter does not provide for such enforcement (p. 152).

Thus by the simple process of expounding, or rather reinterpreting the "existing law," the "vital link" towards a supra-national Federation of the World is supplied. The following is an instance of such reinterpretation: "Thus, in relation to the current view that the rights of the alien within foreign territory are the rights of his State and not his own, the correct way of stating the legal position is not that the State asserts its own exclusive right but that it enforces, in substance, the right of the individual who, as the law now stands, is incapable of asserting it in the international sphere" (p. 27). To quote here the authority of the Permanent Court of International Justice to the effect that "by taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, *a State is in reality asserting its own rights*—its right to ensure, in the person of its subjects, respect for the rules of international law" (A.2, p. 12; see also A.17, p. 28), would perhaps be guilty of being "hidebound by the traditional approach." But with regard to the meaning of the word "intervention" in the Charter, where the intention of the framers of the document appears to have been otherwise, the author does not hesitate to rely strongly upon the "technical" and "current interpretation" of the term (p. 167).

The universal and effective respect for human rights and fundamental freedoms is no doubt the cherished wish of every right-minded individual and it should no doubt be, in Professor Lauterpacht's resonant phraseology, "an object of a moral duty of positive action and . . . a practical standard of human endeavour." Everyone should indeed feel much indebted to him for pursuing the subject with an almost missionary zeal—the present book being but the latest of a series of contributions. But to borrow and adapt another passage from the author's highly stimulating work: "the determination to [pursue this high ideal] . . . ought not to interfere with the duty resting upon the science of international law to abstain from infusing an artificial [interpretation into the existing law]. . . . Any attempt to do so must prove abortive in the long run. If made, with temporary appearance of success, it would tend to weaken efforts in the direction of true progress" (p. 417).

B. CHENG.

INTRODUCTION TO ENGLISH LAW. By PHILIP S. JAMES, M.A., of the Inner Temple, Barrister-at-Law, formerly Fellow of Exeter College, Oxford. [London: Butterworth & Co. (Publishers), Ltd. 1950. xvi and 409 and (index) 21 pp. 12s. 6d. net.]

THIS introductory book for students covers the waterfront, from the basis of law, the legal system and the courts, to contract, torts, property, crime and the like. It contains much useful material and many lucid passages, but in its present state it cannot safely be put into the hands of a beginner. In addition to some bad mistakes, there are too many minor inaccuracies, loose ends and faults of emphasis; and valuable though it is for a beginner to get some idea of the stuff law is made of, the implantation of wrong ideas at the outset may do him harm for many years to come, as well as providing his teachers with more than the usual number of weeds to eradicate.

Some examples must suffice. Thus to take the 54 pages on real property, on p. 880 the book is dealing with settled land and the Settled Land Act, 1925, and mentions that two deeds are now required to create a settlement. "The one deed, called a 'trust instrument,' conveys the land to the trustees and declares the trusts upon which it is to be held. The other deed, called a 'vesting deed,' declares the land to be vested in the person who is for the time being entitled to the enjoyment of it as tenant for life" Now the beginner is not to know how wrong it is to say that the land is conveyed to the trustees, and if he makes anything at all of the two sentences, he will probably conclude that there is an important but unexplained difference between "conveying the land" and "vesting the land"; after all, not even the mysterious law is likely to require a vesting deed to tell a direct lie about who has the legal estate. As the beginner reads on, he may think he has found an explanation when he reads the summary at the foot of the same page—

"(i) Land subject to a strict settlement is in the first place conveyed to the settlement trustees, who thus hold the legal estate in fee simple.

(ii) The vesting deed makes the tenant for life 'estate owner' for the purpose of selling the land. . .

(iii) A purchaser can and must deal with the person declared in the vesting deed to be the tenant for life, as if he were the owner of the fee simple."

This, the student may feel, shows that although the legal estate is really in the trustees, for the purpose of selling it, all concerned pretend that it belongs to the tenant for life. When at the conclusion of his summary the author adds (for another purpose) "Thus the paradox is consummated," the student's cup is filled.

Again, two pages later, it is said that trustees for sale, who have all the powers of a tenant for life, may delegate "these powers" to "any person for the time being entitled to possession of the land under the terms of the trust"; in fact, only the powers "of and incidental to leasing, accepting surrenders of leases and management" may be so delegated, and delegation is to "any person of full age . . . for the time being beneficially entitled in possession to the net rents and profits of the land during his life or for any less period" (Law of Property Act, 1925, s. 29 (1)). In an Introduction, it is indeed permissible and desirable to omit details and qualifications, but why misstate the scope of the power and why substitute "land" for "rents and profits"? And although it is true, as is said on the next page, that a trust for sale may be created by one deed, it is misleading to do so without any warning that this is the exception rather than the rule. The next page enshrines an old students' misapprehension; the case is taken of a limitation to A in tail, and it is said that if "A's eldest son, D, who is due to take next, attempts to disentail without A's consent, he will only be able to give himself a base fee." In fact, having no more than a *spes successionis*, D has nothing which he can bar, and cannot even create a base fee. Again on p. 812, the book states that an owner of a fee simple can convey it "by the use of any words which indicate any intention to part with it. Thus, where A, the tenant in fee simple, grants land 'To B,' in the absence of clear evidence of a contrary intention, B will acquire the whole fee simple." Apart from the insertion of a requirement of "clear evidence," which is not to be found in the Law of Property Act, 1925, s. 60 (1), the presence of a positive intention is thus exemplified by the absence of any contrary intention; well might a student who absorbs this lesson treat contracting in and contracting out as one.

On pp. 810–812, under the heading "The nature of a fee simple," over two-thirds of the space is devoted to the Town and Country Planning Act, 1947. Starting with the premise that "Formerly the rights of landowners were great. An Englishman's home was his 'castle,'" the conclusion is reached that "The Act has in fact reduced the Englishman's vaunted right to his 'castle' to a spectre." This is misleading twaddle. The earlier town planning

Acts (which are not mentioned here) had already imposed a control of development nearly as strict as that under the Act of 1947, and the third of the three objects which the Act was stated to have ("to achieve a planned physical lay-out of town and country alike") also existed under the earlier law. How, then, can it be said that the second of the objects, namely, the imposition of liability to development charges, has had the dramatic effect claimed, especially as the Act could have little effect on the castle unless the owner was proposing to "develop" it?

On p. 314 it is said that the "right to possession" under a lease must be "intended to take effect within 21 years of the grant; any grant which purports to postpone the right for a longer period is invalid." The Law of Property Act, 1925, s. 149 (3), in fact does not deal with the right to possession, but only the taking effect of the term, so that if the term commences to run within the period, it matters not that the lease takes effect in reversion and not in possession. Again, on p. 319, it is said that a tenant cannot contract out of his rights under the Landlord and Tenant Act, 1927, "without leave of the court," which is certainly not what section 9 says. On the same page, in stating what premises the Rent Acts apply to, it is said that "the premises concerned must not exceed a certain rateable value. This value is determined upon a basis (or, more correctly, upon bases, for there are two methods of valuation) which ensures that the vast majority of premises may become subject to control." Apart from the possible picture of the rating system having as its objective the bringing of most houses within the Rent Acts, the unexplained bracketed words are likely to puzzle rather than assist the beginner. Yet again, the treatment of *Walsh* v. *Lonsdale* on p. 315 is unhappy in that the result is made to depend upon a supposed rule that even though it has been agreed that "rent should be paid yearly in advance," "a year's rent cannot be demanded in advance in the case of a yearly tenancy." "The principal rights of a legal mortgagee" are said to be possession, foreclosure, sale and an action on the personal covenant; even if for "rights" one reads "remedies," it seems curious to devote a paragraph each to possession and the action on the covenant, and not even to mention appointing a receiver (p. 345).

If the reader turns from real property to other subjects, similar defects appear. Does p. 71 convey the right idea to a beginner by saying that a plaintiff starts an action by "purchasing" a writ of summons, or that entering an appearance means "signifying in writing to an official of the court an intention to defend the action" (when no word of such an intention is contained in the appearance)? How often in an Order 14 Summons does the plaintiff swear an affidavit "before a Master" (p. 73)? When even the cases important enough to be reported show that more often than not the Judicial Committee of the Privy Council includes one or two members not entitled to sit in the House of Lords, is it right to say that the judicial staff of the Committee is "virtually that of the House of Lords" (p. 52)? Why give the composition and number of members of the old Court of [*sic*] Crown Cases Reserved and say nothing about either in the case of the Court of Criminal Appeal (pp. 49, 50)? Is it wise to say that since 1834 the Old Bailey has been the assize court for London, when it has just been pointed out that assizes take civil work and some divorce business; and do only King's Bench judges go circuit (p. 46)? What esoteric distinction is there between mandamus and prohibition, the former "issuing from the High Court" whereas the latter "issues out of a Higher Court" (p. 162)? Does petit treason merit five lines (p. 185) when the Statute of Uses is not even mentioned? Which of the "modern enactments" have "prohibited an appeal to the courts" in the case of rent tribunals (p. 164)? Is it true that "all disputes concerning compulsory acquisition of land" are to be submitted to the Lands Tribunal (p. 170), or is it to be assumed that nothing except matters of compensation provoke disputes? Will beginners be helped by being told that the rule that an acknowledgment may make a statute barred debt actionable is an exception to the rule that consideration must not be past (p. 287)? And, *pour rire*, how many

readers will assume from the repetition of the word "took" (instead of "used") on p. 227 that the unfortunate Mrs. Carlill swallowed the smoke ball? (Incidentally, a distinguished member of the present Court of Appeal can speak with personal knowledge of the consideration which moved from those who used these balls.)

But this catalogue of samples must close. It may perhaps be said with some justice that too much space has been devoted to reviewing a beginner's book; yet beginners are tender plants, requiring the highly skilled treatment which is demanded by any attempt to combine lucidity, comprehensiveness, brevity and accuracy. It is important that the tasks of those who are so often both infants and, in matters of law, lunatics (or so their teachers would say) should not be made harder by exposing them at the outset to a text in which they cannot place implicit trust. One must grieve for all the work that has gone into this book, published at so reasonable a price, and for the many sound and telling passages that it contains, in bulk greatly exceeding the defects; but the strength of the chain of learning is that of its weakest link, and at present the weak links of the book are both too many and too frail.

R. E. MEGARRY.

THE LAW OF TORTS: A TREATISE ON THE LAW OF CIVIL WRONGS. Fourth Edition. By S. RAMASWAMY IYER, B.A., B.L., Advocate, High Court, Madras. [Calcutta: Eastern Law House, Ltd. 1950. lxvii and 704 pp. (with index). Rs. 16; £1 5s.; $4.]

THE first edition of this treatise, which was published in 1932, was described by Holdsworth in his Introduction as "a valuable addition to the existing text-books on this subject," containing "an accurate and well arranged summary of the principles of this branch of law," with "a comparative and a jurisprudential flavour." It was apparently received by the legal profession in India "as a book of outstanding merit" (preface to the second edition), and it is therefore somewhat surprising that the book should be so little known in the Anglo-Saxon legal world. It is true that brief notices of the first edition appeared in the law reviews, and that in 1939 Winfield welcomed the second edition as "a reliable statement of the English law on the topic" and pronounced it free from "intellectual rickets" and "quite capable of standing upon its own legs" (55 L.Q.R. 126). Nevertheless, it remained comparatively obscure until the present edition. This edition, however, has been deemed sufficiently important to warrant detailed review, and considerable differences of opinion have already been expressed as to its merits. (*Cf.* the very favourable review by Cecil Wright, 29 Can Bar Review 555, with the extensive criticism voiced by Edward F. George, 67 L.Q.R. 399.) The present reviewer does not propose to take sides in this matter, although he inclines towards Dean Wright's more favourable view. Instead, he will merely record his own impressions and indicate what appear to him to be the salient features of the book, in the hope that in this way he may tempt some folk to get hold of it and judge for themselves.

The first impression is one of amazement at the remarkable erudition of this truly learned author. Indeed it is possible that the book is over-burdened with authority, so extensive and copious is the citation of English, American and Continental case law and academic literature Certainly there is little that has been overlooked.

Secondly, there is admiration for the author's extraordinary grasp of the more difficult tort problems and his sound historical approach. There can be no doubt that he has drunk deep at the fountain. Such authorities as Pollock, Maitland and Holdsworth are constantly referred to, and many passages show how well the author appreciates the significance of the past and assesses the trends of the present in the development of the law of tort.

Thirdly, there is envy of the liberty which courts in India now enjoy to mould the law of tort according to their own ideas, and of the consequent freedom which the author feels with regard to the exposition of his subject. As he says in his preface to the fourth edition, "the Indian Law of Torts is today independent of the English law, and while English rules and cases still furnish valuable guidance, a far more critical and independent outlook can be brought to bear on them now than was done formerly." The result is most refreshing and stimulating to the English reader. The author does not hesitate to express his view that certain decisions of the English courts are bad and should not be followed in India, for example, *Malone* v. *Laskey*, *Cavalier* v. *Pope*, *Ball* v. *L.C.C.*, *Jacobs* v. *L.C.C.*, *Sutton* v. *Bootle Corporation*, *Le Lievre* v. *Gould*, *Bradford* v. *Pickles*, and *Rylands* v. *Fletcher*. The Indian law of tort already differs from the English law in several respects, for example, slander in any form is actionable *per se*, and the Rule in *Smith* v. *Selwyn* does not apply. We may now expect further departures. If the differences are not yet very great, this may be due in no small part to Mr. Iyer's success in imparting to others the tremendous enthusiasm which he obviously feels for the English system.

One of the most striking features of the book is the unusual plan of exposition adopted by the author. He discusses the specific torts first, and he does not begin to consider the general principles of liability until page 899, while the chapters on the general defences and remedies follow at the end of the book. Negligence and liability under the rule in *Rylands* v. *Fletcher* are not discussed under the heading of specific torts but under principles of liability. This arrangement is in accordance with the author's desire to examine torts from the point of view of breach of right and also with his belief that all tortious liability is capable of being attributed either to intentional or negligent conduct, the instances of absolute, vicarious and statutory liability being regarded as exceptional and anomalous. The result can hardly be described as felicitous. The intentional or negligent infliction of bodily harm is raised to the status of a tort, a species of the genus Injuries to the Person. *Rylands* v. *Fletcher* is confused with Nuisance, for example, at page 214, and is in any case disapproved. The chapter on Nuisance is not very convincing, and the chapter on Negligence suffers from being forced into the author's delictual strait-jacket.

On the other hand, one must say that the chapter on Defamation is very good, and so are the chapters on Interference with Contractual and Business Relations, and on Conspiracy. There is an interesting discussion of liability for inflicting nervous shock, and also on the right of privacy. The importance of *Donoghue* v. *Stevenson* is clearly brought out, and the author's desire to approach such matters as the duties of occupiers to persons coming upon their premises and of vendor of land to vendee, without feeling himself bound by any "rigid dogma" (see page 441), is particularly valuable. Recent case law is noted and incorporated into the text where necessary to an extent which puts current English publications in the shade.

A major weakness of the book is the vast number of errors which it contains. These cannot all be excused by the exigencies of publishing in India, and many of them are errors of law. A good deal more care should be taken to eliminate them in future editions. The following are just a few examples:— The title to page v should read Preface to the First Edition, not the Second; page 28, n. 2, it is not strictly correct to refer to the Act of 1925 as the latest Workmen's Compensation Act; page 84, line 2, should read "insofar as it was consonant . . ."; page 88, line 5, Chapter XIII on Injuries to Miscellaneous Rights is wrongly referred to as belonging with the chapters on principles of liability, whereas it belongs with the chapters on the different kinds of torts; although one of the references to the case of *Manindra Nath* v. *Mathura Das*, namely the reference at page 72, n. 8, is corrected in the corrigenda, the same case is incorrectly referred to on the opposite page, and is not corrected!; page 247, n. 4, the reference to the Report of the Committee on the Law of Defamation

does not give the Command No., and the Report is incorrectly described in the text on the same page as a report of the Law Revision Committee; it is no longer true to say, as is said at page 298, n. 4, and page 803, n. 2, that the plaintiff in libel cases can deliver *Elliott* v. *Garrett* or *Plymouth Mutual* interrogatories: see the amendments to R.S.C. Ord. XXXI, made in April, 1949; page 418, n. 2, the *Law Quarterly Review* has not yet reached 400 volumes!; page 628, the lady in *Dann* v. *Hamilton* [1939] was not a passenger in a bus, as the text implies, and the reference to the report in the Law Reports is incorrectly given.

The following are some suggestions for the improvement of the book in the next edition. The English practice of using square brackets in the citation of cases ought to be adopted. More attention should be paid to the general lay-out of the book, especially the paragraph headings In some instances they are misleading, see, for example, the heading to paragraph 4, page 487, Test of Probability or Foreseeability, when the paragraph is mainly concerned with *Re Polemis*. The cross-references should be to page number and not to paragraph number; see, for example, the reference on page 42, n. 2, which refers to Chapter I, paragraph 24, which extends over four pages, when the point involved is to be found on one of them, page 37. The references to standard textbooks should be to the latest edition; see, for example, page 8, n. 4, and page 495, n. 7. It is unsatisfactory to be referred to the Third Edition of the author's book for a discussion of *Stanley* v. *Powell* and *Holmes* v. *Mather* (page 42, n. 8), and one cannot fairly deal with accident as a defence in tort in the space of eight lines (page 604). At page 559 there is no mention of agency or partnership as giving rise to vicarious liability, and we are left in doubt as to the author's views on this matter.

One may sum up by saying that the book ought to be of great value if used with discrimination. Law teachers and practitioners would do well to study it carefully, but it can hardly be recommended with safety for any but the brightest students.

J. E. HALL WILLIAMS.

AN OUTLINE OF LOCAL GOVERNMENT AND LOCAL FINANCE. By SIR CECIL OAKES, C.B.E., and W. L. DACEY, LL.B. [Sweet & Maxwell, Ltd. 1950. xv and 497 pp. £2 5s.]

LOCAL RATES. By J. H. BURTON. [Stevens & Sons, Ltd., "This is the Law" Series. 1950. x and 90 pp. 4s.]

THE first of these books is the ninth edition of *Wright and Hobhouse* which last appeared in 1937. The authors observe in their preface that local government has in the intervening thirteen years undergone "what can almost be described as a metamorphosis." In fact, the shape of local government is, unfortunately, almost the only aspect which has not changed. But certainly no book on the subject written before 1945 has much value today. The new edition is full and detailed. Its outstanding virtue is accuracy and I find myself unable to append the usual list of minor errors inserted by reviewers to improve any subsequent edition. Occasionally the meaning of the text is not clear at first reading but in almost every case this is the result of compression for which it is difficult to blame the authors. The footnotes are not inserted, as is often the practice, to introduce subtleties or throw doubts on the accuracy of statements made above. Instead they frequently contain valuable additional information, such as the names of the boroughs for which stipendiaries have been appointed under the Local Government Act, 1882 (p. 24), the names of the county boroughs (p. 28), of counties of cities and counties of towns (p. 29), the names of the counties which in 1948–9 qualified for the application of the sparsity factor under the equalisation grant (p. 427), and the number and distribution of acres acquired for small holdings (p. 258);

many other examples could be given. A chapter on Negotiating Machinery in Local Government is almost the only and certainly the fullest account that has appeared anywhere.

For the teacher and student, this book at once invites comparison with Hart's *Introduction of the Law of Local Government and Administration*. There is room for both, but the comparison reveals how much each book omits. *Hart* is avowedly concerned with "the law"; *Wright and Hobhouse* is not. More accurately, *Hart* devotes more space to the law made by the courts and *Wright and Hobhouse* more space to the law made by Parliament and the Administration. *Wright and Hobhouse* provides no Table of Statutes; they are often referred to in the General Index but without reference to sections. Most revealing of all is the Table of Cases. Twenty-three cases find a place; of these, thirteen were decided before 1920. Two post-1945 cases are cited: *Associated Provincial Picture Houses, Ltd.* v. *Wednesbury Corp.* (1948) and *Middlesex C.C.* v. *Miller* (1948). Most remarkably, of the cases cited, only two or three can be called leading cases on local government law. No one is to be blamed for writing a book on some aspect of public administration without reference by name to any case; to refer to three hundred or more cases is likewise excusable; but to refer to twenty-three cases and those neither the most important nor the most recent seems to indicate a certain indecision. Moreover, the result has been that the effect of many cases has not been incorporated in the text so that the story, as told, is incomplete. For example, none of the "natural justice" cases is quoted or incorporated; the procedure with which they are concerned is therefore inadequately described. Again, the section of the book on Local Finance covers 62 pages. No case is mentioned. A lawyer who reads an account of the district audit feels a sense of loss if the names of Roberts and Hopwood do not leap italicised from the page. This weakness of lawyers for the old familiar faces need not, indeed, be pandered to. But when there is no incorporation in the text of the effect of this and other more vital cases, the text is incomplete. The further question, how far some legal knowledge is necessary to those who write books on administrative powers and procedures, is clearly not relevant to the book written by these two learned authors. The result is that the law student cannot be directed to this book in the first instance though he will gain much benefit from it later; for non-lawyers the book is admirable but they should be warned that there is often something to be added.

To apply these arguments to the second book under review would, despite the title of this well-known series, be unfair. Moreover, the author cites many cases (which are not indexed) as examples. He sets out the complicated provisions in a straightforward manner, and succeeds, at times despite himself, in attaining clarity—"despite himself" because such sentences as these occur: "In normal cases, somebody, whom many vigilant rating officers contend is enjoying beneficial occupation of a kind which equitably makes him liable for rates thereon, is shown to be legally liable, if possible." "Rates are not taxes and vice versa, though the terms are often used loosely." The print is very small.

J. A. G. GRIFFITH.

PRINCIPLES OF AUSTRALIAN ADMINISTRATIVE LAW. By W. FRIEDMANN, LL.D. [Cambridge University Press as agents of Melbourne University Press. 1950. 112 pp. 12s. 6d.]

THIS book is a welcome addition to the rather scanty literature on Administrative Law in the common-law world. It provides a lucid elementary summary of Australian administrative law.

The English reader will find many interesting points of difference between Australian and English administrative law. Unfortunately, authority for some

of them is not cited, *e.g.*, that there is an implied right to legal representation before administrative tribunals (p. 106), and that vocational tribunals must give reasons for their decisions "even when it is not specifically stated" (p 111). In the chapters on judicial remedies against the Administration, many important matters are not dealt with, *e.g.*, what interest has to be shown by an applicant for a mandamus; jurisdictional fact; error on the face. Inaccuracies include these: *Westminster* v. *L.N.W. Ry.* is cited as an authority on by-laws (p 88); a quotation on statutes binding the Crown is wrongly attributed to the *Magdalen College Case* (p. 44–45); of *Metropolitan Police District* v. *Tatum* [1948] 2 K.B. 68 it is said that "the learned judge assumed as a matter of course that this was a case of 'loss of services'" (p. 57) whereas he said "here the claim is not based on loss of services" (pp 72–3) and decided the case solely on quasi contract. We are told that in *Spark* v. *Edwards Ash, Ltd.*, strong opinions are expressed that regulations cannot be held bad for unreasonableness (p. 32); that the Crown Proceedings Act exempts the Crown from liability for "the maintenance of the armed forces of the Crown" (p. 58). It is said that the *Amphitrite Case* held "that petition of right will lie only in respect of commercial contracts" but *Robertson* v. *Minister of Pensions* is omitted; there is a reference to the Public Authorities Protection Act, 1893, but none to s. 21 of the Limitation Act, 1939.

H. STREET.

COPYRIGHT AND INDUSTRIAL DESIGNS. By A. D. RUSSELL-CLARKE, of the Inner Temple, Barrister-at-Law. [London: Sweet & Maxwell, Ltd. 1951. xv and 261 pp. 37s. 6d.]

THE main advantage of this book is that it embraces all branches of copyright including that of industrial designs which, because of the accidents of legislation, has hitherto tended to be treated as a branch of patent law rather than of copyright law to which it more properly belongs. The separation brought about in 1949 by the Patents Act and the Registered Designs Act of that year renders this book particularly timely. It consists of three parts and a brief historical introduction: copyright under the Act of 1911, registered designs under the Act of 1949, and a discussion of the inter-relation and overlapping of the two codes. The second part is virtually a second edition of the learned author's earlier work on Registered Designs which appeared in 1930

While the book undoubtedly contains a considerable amount of useful material, particularly in the parts on Designs and on the overlapping between them and copyright under the Act of 1911, the treatment in general seems somewhat slight for a practitioner's textbook. This is particularly noticeable in the chapter on Publishing Agreements which is potentially most useful but which is insufficiently comprehensive to be an adequate guide. The treatment, too, is marred by the learned author's habits of over-statement and inconclusiveness; examples occur at p. 80 (*noms de plume* are not *necessarily* the property of authors themselves rather than the journals for which they write), p. 87 (copyright in a whole work is not destroyed merely because it contains a libel) and p. 180 ("If a manuscript is used for a purpose other than that for which it was submitted, such use may amount to a breach of confidence." Obviously, but with what consequences? The author does not say).

It would have been helpful if, in Chapter 8 when considering the position of American authors regarding copyright in England, something had been said about the converse case of an Englishman's position regarding copyright in the U.S.A. True, this is not a question of English Law, but it is of vital importance to the English author and one upon which he is likely to seek for guidance from his English legal adviser. At places, too, the arrangement seems confusing; for example, *Corelli* v. *Gray* seems to have little to do with

the scope of Dramatic Copyright (under which it is considered at length at p. 42) but to concern solely the question of Infringement (under which it is in fact also dealt with briefly at p. 75).

A serious inconvenience to the average practitioner is the fact that cases reported in the R.P.C. (which only specialists are likely to have available) are cited only under that reference, even although they are also reported in one of the general series. This inconvenience is increased because dates of cases are not given (unless the dates form an integral part of the reference, which they do not in the case of R.P.C.) and the Table of Cases gives no references at all. It is to be hoped that this false economy will be corrected in any later edition. If this is done and the general treatment is made more comprehensive this book should form a useful addition to the lawyer's bookshelves.

L. C. B. GOWER.

THE PATENTS ACT, 1949. By The Chartered Institute of Patent Agents. [London: Sweet & Maxwell, Ltd. 1950. vii and 827 pp. £1 17s. 6d.]

A good commentary to an Act of Parliament should fulfil the following requirements:—

(i) It should state the significance of each individual section.

(ii) It should explain any parts in the section which are not clear on their face.

(iii) It should refer to any other section in the Act or in any other statute which restricts or otherwise affects the section under review.

(iv) It should refer to the Rules and Orders regulating the procedure or other details under the section.

(v) In the case of an amending or consolidating Act it should briefly draw attention to the differences in the old and the new Act.

(vi) It should cite all decided cases relevant to the interpretation of the section.

(vii) It should give the commentator's view on the correct interpretation of the section on questions not yet decided by the court.

(viii) It should give advice to the reader on how best to draft agreements, claims, or other documents governed by the section or to prepare and conduct legal proceedings controlled by the section.

The commentary on the Patents Act by the Chartered Institute of Patent Agents fulfils some of these requirements, but falls short in others. It states the significance of the individual sections of the Act and explains them where necessary. It contains references to other sections of the Patents Act and to Statutory Rules, Orders, and Instruments governing the procedure under the respective sections of the Patents Act. Differences between the new provisions in the Patents Act, 1949, and the old law are set out in very great detail.

On the other hand, in the commentary references to decided cases are few and far between. This is a serious omission because the significance and effect of many of the provisions of the Patents Act, 1949, can be understood only by reference to case law, and numerous cases decided under the old Acts are still good law under the Patents Act, 1949. For example, the definition of "invention" as a "manner of manufacture" in section 101 is meaningless without reference to cases such as *Rantzen's Application* (1947) 64 R.P.C. 63, deciding that the generation of wireless waves having particular characteristics is a patentable manner of manufacture, or *Fishburn's Application* (1940) 57 R.P.C. 245, deciding that the arrangement of words on a printed ticket or

coupon is not a patentable manner of manufacture. These and other relevant cases are not mentioned in the commentary to section 101. The same applies to leading cases of importance to the interpretation of numerous other sections of the Act which are not cited in the commentary.

In a book compiled by members of The Chartered Institute of Patent Agents, with the assistance of members of the Bar, the reader would have been grateful to find advice on the filing of patents, the drafting of claims, the conduct of proceedings before the Patent Office, the preparation and conduct of infringement actions, etc., which goes beyond a mere summary of the provisions of the Act and the Rules. In a footnote to section 67, which deals with the reference to the Comptroller of disputes on infringements, the advice is given that the agreement containing the terms of reference should deal with the matter of security for costs. Otherwise the instances where the great wealth of knowledge and practical experience of the joint authors is made available to the reader are rare.

The important problem to what extent the Patents Act recognises a monopoly for inventions on food and medicine under section 10, and restricts it by compulsory licences under section 41, is hardly dealt with in the commentary to either of these sections.

While the book under review is rather barren from the point of view of jurisprudence, case law and fundamental problems of patent law, it is an excellent work from the practical point of view. Patent agents, counsel, solicitors, as well as judges and officials of the Patent Office will find in it all routine information they need, such as the text of the Patents Act, the Patents Rules, the Patents Appeal Tribunal Rules and the Tribunal Fees Order, the Rules of the Supreme Court, as far as they affect patent procedure, the Register of Patent Agents Rules, and a number of other Statutory Rules, Orders and Instruments concerning the patent law. There is a good Index; the book is well printed and bound, and is likely to stand up to hard wear by the busy practitioner. A commendable feature is space after each section for memoranda to be entered by the user. In fact, apart from citations of decided cases, the work contains everything that can be desired in a reference book on patent law intended for daily use. The reviewer can testify that within the short time since its appearance he has seen it frequently, not only on the book-shelf, but actually in use on the desk of many a practitioner in the patent field.

PETER MEINHARDT.

THE LAW OF MASTER AND SERVANT. By F. R. BATT. Fourth Edition. By J. CROSSLEY VAINES. [Pitman. xxxvi and 520 pp. 30s.]

A NEW edition of *Batt* is a welcome arrival for teachers and students of employment law. Of all the comparable works in this field, *Batt* is easily the most readable. The present edition maintains the high proportion of statute law of its predecessor, which is no more than a symptom of the times and proper. While by lovers of case-law the common law of master and servant may be regarded as the heartland of employment law, that area is in relative terms constantly diminishing before the contemporary need for an increase in the production of legal rules which is equally as important as the need for an increase in the production of commodities.

Mr. Crossley Vaines' edition brings the law down to the latter half of 1949. Its scope includes the relevant contract, tort and criminal law, and reference in sufficient outline to legislation regarding truck, shops, minimum wages, welfare, factories, disabled persons, reinstatement in civil employment, essential work, social insurance and the now historic controversial "Order 1305." The National Insurance (Industrial Injuries) Act, 1946, is discussed in

two full chapters at what is probably excessive length for a work of this character

By way of constructive criticism, I would list the following comments on matters of detail. The duty to provide work and the right to work (48, 85) deserve a larger treatment than that accorded them, especially in the context of a full employment economy, and with the citation of *Collier* v. *Sunday Referee* (85) should go that of the more recent *Hall* v. *British Essence* (1946) 62 T.L.R. 542. With regard to contracts not to be performed within a year of their making (45), the rule in *Donellan* v. *Reed*, and the reason why that rule was not applied in *Reeve* v. *Jennings* (45), are left unclear. Again, it is, I think, worth mentioning as illustrative of the dynamic situation of the law that the revised social attitude towards domestic servants today might well lead the courts to condone the housemaid's fulfilment of her moral obligation in *Turner* v. *Mason* (61).

The treatment of the effect on paying wages during illness of the receipt of injury or sickness benefit (75–6) is not altogether satisfying In *Marrison* v. *Bell* (75) the Court of Appeal distinguished the effect of the Workmen's Compensation Act, 1925, and of the National Health Act, 1936, not only on the ground stated in the headnote and repeated in *Batt* but also in the light of the different principles and purposes of the Acts (*cf.* [1939] 2 K.B. at 204). There would, moreover, seem to be implicit in the Court of Appeal's judgment the fact that an important, if not vital distinction lies in the different financial sources of the compensation under the 1925 and benefits under the 1936 Act, for, in the one case, the employer paid the entire compensation, whilst, in the other, the employee contributed to the central fund twice as much as the employer. It is this distinction that may well prove decisive in any future case involving the National Insurance Act, 1946. At p. 76, line 6, it may be noted, the use of "payment" instead of "absence" is required to give full meaning to the sentence.

Some additional points remain I think to say that the House of Lords in *Mersey Docks* v. *Coggins and Griffiths* "adopted" (900) the test of control laid down in *Donovan* v. *Laing* is not quite as exact as to point out that the House in fact continued the *development* of the rule in *Donovan*. A discussion of *volenti* (842–5) demands today a summary of the statement of the Court of Appeal in *Bowater* v. *Rowley Regis Corp.*, which underlines the exceedingly limited possibilities of the defence of *implied* consent in employment cases. Furthermore, the special subjective test of contributory negligence that has, since *Caswell* v. *Powell Duffryn*, been used in employment cases merits far greater emphasis than is given to it (847–9), for it strikingly manifests a privileged position conferred by the modern courts on, particularly, industrial employees in deference to the real conditions of continual risk in which they work.

Throughout the book there appears to be only one serious omission. There is no reference at all to the defence to breach of statutory duty of "delegation of duty," the invocation and interpretation of which has been considerably stimulated by the Contributory Negligence Act, 1945, and which is embodied in the line of cases from *Vincent* v. *Southern Ry.* [1927] A.C. 430 to *Beal* v. *Gomme* (1949) 65 T.L.R. 543. The Court of Appeal decision in *Lavender* v. *Diamints* ought to be cited as well as the decision at first instance if only because Tucker L.J. (as he then was) expressed reservations regarding the relevant proposition in *Batt* (347): [1949] 1 K.B. 585, 592. In the pages devoted to the duty to provide a safe system of work (882 *et seq.*), *Dyer* v. *Southern Ry.* [1948] 1 K.B. 608 deserves a place since it involves the system relating to work that is, quantitatively, of considerable importance. And *Holt* v. *Rhodes* occurs at p. 884 in *Batt*, and not, as stated in the Table of Cases, at p. 478, which is its page in [1949] 1 All E.R.

It ought, I think, to be common form in modern legal textbooks for all or the main case references to be included in the Table of Cases, and a

reference to "(Pollock's *Contracts*)" which is to be found in *Batt* (94, n. 1) must, I fancy, be viewed as sub-standard. Also, as is regrettably common, references to articles like N. S. Marsh's "Severance of Illegality in Contract" (64 L.Q.R. 280, 847), or those of Dr. O. Kahn-Freund and W. A. Lewis on *Hivac's Case* (9 M.L.R. 145, 280), which are germane to the subject-matter of *Batt*, and contain interesting and useful discussions within a small compass, are conspicuous by their absence.

Turning aside from these criticisms which are offered for the learned editor's consideration, it is good to see that common employment has been boldly lifted out of the body of the book and outlined by the learned editor in an able excursus; and, finally, it is to be hoped that Judge Batt will implement his offer in the Preface to include in the next edition, out of the rich store of past experience that lies deposited in the workmen's compensation cases, a selective analysis of the case-law that remains of value to us in understanding the new statutory provisions

C. GRUNFELD.

LEWIN ON TRUSTS. Fifteenth Edition. By RONALD COZENS-HARDY HORNE, of Lincoln's Inn, Barrister-at-Law. [London: Sweet & Maxwell, Ltd. 1950. clxxvii and 886 and (index) 124 pp. With First Supplement (to January 1, 1951), by Miss B. K. SEARLE, Barrister-at-Law. iv and 10 pp. 105s. net.]

Lewin is a good example of a practitioner's book which is becoming more unmanageable with every succeeding edition. A large body of material is being superimposed on a structure which cannot bear it. The need is for reorganisation, revision and much rewriting—a drastic pruning of archaisms and a resulting concentration of effort on modern developments. It is hoped that there will be a policy of cutting out the dead wood in the next edition, and the book will emerge from vigorous treatment more readable, more accurate and more wieldy.

The present edition does not carry out such a policy, but within its limits it appears to be well done, though one cannot give it unqualified approval. To begin with, Chapter I, The Definition of a Trust, is completely archaic: the definition of a trust does not begin and end with Coke. On p. 25 it seems to have been overlooked that since the Crown Proceedings Act, 1947, an action, not a petition of right, is available against the Crown. On p. 40 on the question whether the proceeds of sale of land held in trust for sale are within section 53, L. P. A., 1925, *Re Price* [1928] Ch. 579; *Re Kempthorne* [1930] 1 Ch 268, and *Att.-Gen.* v. *Public Trustee* [1929] 2 K.B. 77 are mentioned, but *Re Harvey* [1947] Ch. 285 is overlooked. On p. 41 *Rochefoucauld* v. *Boustead* [1897] 1 Ch. 206 is cited, but *Bannister* v. *Bannister* [1948] 2 All E.R. 133, is not mentioned. On p. 58 it is said that "since debts and legal choses in action have been made transferable at law, questions under this head" (*i.e.*, the voluntary equitable assignment of a legal chose in action) "will be of less frequent occurrence". Experience has clearly proved this to be wrong. See *Re Fry* [1946] Ch. 312, *Re Rose* [1949] Ch. 78, *Holt* v. *Heatherfield Trust, Ltd.* [1942] 2 K.B. 1, none of which are cited in the book, and *Re McArdle* [1951] 1 All E.R. 905, which has recently been decided by the Court of Appeal. On p. 54 it is stated that a voluntary deed assigning a promissory note is valid notwithstanding the absence of indorsement, and *Richardson* v. *Richardson* L.R. 8 Eq. 686, is cited in support, and the reader is warned to see *Richard* v. *Dellridge* L.R. 18 Eq. 11. But the remarks of Jessel M.R. in the latter case make it very doubtful whether *Richardson* v. *Richardson* can still be regarded as good law, and it is suggested that the

case should be treated with a great deal more suspicion than it is accorded in the text. On p. 58, note (*x*), *Fletcher* v. *Fletcher* 4 Hare 74, is cited for the proposition that "a voluntary covenant to pay a sum of money to A in trust for B has been allowed to create a debt in favour of B," but none of the variations of this type of case as exemplified in *Harmer* v. *Armstrong* [1934] Ch. 65, *Re Schebsman* [1944] Ch. 83, and *Vandepitte's Case* [1933] A.C. 70, is discussed. On p. 488 the relegation of *Re Brockbark* (*sic*) [1948] Ch. 206, to a footnote is surprising in view of the fact that the decision is important in illustrating the limitation of the power of beneficiaries, even if *sui juris* and absolutely entitled, to control the discretion of trustees. Again, though there is much discussion of *Keech* v. *Sandford* 2 W. & T.L.C. (9th ed. 648) and *Re Biss* [1903] 2 Ch. 40 (pp. 156–7), there is no mention at all of *Re Knowles' Will Trusts* [1948] 1 All E.R. 866. On p. 76 *Shelley* v. *Shelley* L.R. 6 Eq. 540, is cited to illustrate the interpretation of precatory words in a will, but a recent case which followed it, *Re Steele's Will Trusts* [1948] Ch. 603, is omitted altogether. On p. 881 *Re Wellsted's Will Trusts* [1948] W.N. 210, is cited for a proposition which is not law, though on p. 606 account is taken of the Court of Appeal decision [1949] Ch. 296, and mention is made of the fact that the decision of Vaisey J. was reversed. On p. 721 the reference to "quasi-fiduciary" to describe the position of the charities in *Re Diplock* [1948] Ch. 465, appears to be unnecessary, but as it stands it surely requires expansion and illustration. And though the old law on section 8 of the Trustee Act, 1888 (period of limitation of trustee's liability) is fully stated, *Re Lands* [1939] Ch. 828, and *Re Milking Pail Farm Trusts* [1940] Ch. 996, are inexplicable omissions from the section dealing with the Limitation Act, 1939 (pp. 821–2).

In conclusion, therefore, one can say that the present edition of *Lewin* is not as valuable as it might have been, but it remains the repository of monumental learning, of practical scholarship, and the *sine qua non* of research in the law of trusts.

O. R. MARSHALL.

A PRACTICAL EPITOME OF THE DEATH DUTIES. Second Edition. By DAVID HARRISON, LL.D., of the Estate Duty Office, London. [Sweet & Maxwell, Ltd., and W. Green & Son, Ltd. 1951. xx and 395 pp. (index 40 pp.). 87s. 6d. net.]

SINCE the first edition of this admirable work was reviewed at length on its appearance ten years ago at 5 M.L.R. 283, this notice will be confined to changes made in the current edition.

In the first place the repeal of the Legacy and Succession Duties by the Finance Act, 1949, has enabled the learned author to reduce the chapters on these duties, which occupied well over a hundred pages in the original edition, to a single short chapter (IX), Obsolete Duties. The space saved has been very profitably devoted to verbatim extracts from the many statutes, dating from 1894, relating to the Death Duties. This rearrangement has enabled Dr. Harrison to clear, to a very great extent, the text of his commentary from the quotations from these statutes which somewhat hindered the easy reading of the first edition; this is a great improvement.

The general plan of the earlier edition has been maintained by Dr. Harrison, but his task in weaving into the text all the changes both in statute and in case-law during the last ten years has been by no means easy as can be appreciated from the fact that no fewer than nine Finance Acts had to be considered. This has meant, in parts, a complete rewriting of the text—see especially Chapter I, section 5, Benefits from Companies.

The Appendices include, in addition to the Statutes, the relevant Rules of the Supreme Court and the Statutory Rules and Orders relating to Land

Values Appeals and the Double Taxation Conventions. The Table of Cases would be much more useful if it set out the various series of law reports; as it stands, there is but a bare note of the page where the case appears and the footnote there has only one reference, normally that of the Law Reports

This work is emphatically not one for the student, but it should prove a valuable addition to the library of the busy practitioner. Scottish lawyers have not been overlooked, for, with the able assistance of Mr. R. A. Grieve, B.L. of the Estate Duty Office, Edinburgh, Scots law has been incorporated where it differs from English law, see, for example, the note at p. 52, Joint Holdings under Scottish Law.

A. FARNSWORTH

FACTORY LAW. By H. SAMUELS. Fifth Edition. [Stevens. xxviii and 719 pp. £8 8s.]

THE principal occasion of this latest edition of Mr. Samuels' work was the Factories Act, 1948. As in the case of the 1937 Act, a lucid introduction prefaces the sections of the new Act with their attendant commentary. In addition, the regulations passed under the 1937 and 1948 Acts are given in full, and the comments on the 1937 Act brought up to date.

From the absence of *Burns* v. *Terry* [1950] 2 All E.R. 937, reported in November, 1950, it may be concluded that the new edition brings the law down to the last quarter of 1950. In this carefully prepared publication, the sole omissions discernible are *Schwalb* v. *Foss* (1946) 175 L.T. 345, in relation to the meanings of regs. 17, 19 and 28 (iii) of the Woodworking Regulations, 1922, *Green* v. *Hilger* (1946) 90 S.J. 529, concerning section 14 of the 1937 Act and the application of the rule in *Nicholls* v. *Austin* [1946] A.C. 493, and, in relation to the defence of delegation of duty, *Massey* v. *Lingwood* (1945) 89 S.J. 316. Finally, the case in 88 LLL.R. 1 is not "*Chatham*" but *Chatburn* v. *Manchester Dry Dock*.

As the learned author points out in his Preface, the Table of Cases now cites all the reports, and tables are included of the relevant statutes and statutory instruments. These render yet more efficient a book that is of standard reference for all practitioners, teachers and students, and a pleasure to handle.

C. GRUNFELD.

PRIVATE INTERNATIONAL LAW. By MARTIN WOLFF. Second Edition. [Oxford: at the Clarendon Press. 1950. xlviii and 681 pp. 85s.]

THIS work possesses many of the qualities which are believed to rouse the immediate dislike of the common lawyer: it stresses the theoretical foundations of the law, it subjects the English rules of Private International Law to comparison with foreign rules, it deals with the law as it should be no less than with the existing law, and, most significant of all, it is not afraid to dwell at great length upon hypothetical questions. It has yet succeeded as shown by the publication of this second edition This success, therefore, calls for congratulations not only to the author, but also to the English Conflict of Laws, which has attained sufficient maturity to absorb the wealth of learning and of legal wisdom contained in this book.

The author's mastery of the techniques of English law is shown in the manner in which the new developments have been incorporated in this edition Thus there is a full account of *Re Bischoffsheim*. The heavy criticism to which this decision has been subjected is effectively met by pointing out that the

English *lex successionis* is only relevant to explain that "children" means legitimate children and that it does not provide the answer to the question how to determine legitimacy. Again, *Lorentzen* v. *Lydden* is given the detailed attention it requires (especially on page 528) Dr. Wolff prefers to treat this case as one of expropriation (requisition might be a better term) as distinct from confiscation. It might have been relevant when dealing with the "new and rather dangerous conception of public policy," which formed one of the three alternative bases of this judgment, to draw attention to the not dissimilar provision of the Bretton Woods Agreement (Article VIII, 2 (*b*)), which demands invalidation of contracts violating the exchange control laws of a member regardless of whether the legal system which has been violated is to be applied under Conflict of Laws rules. This Agreement is duly noted (on page 474) but no comment is offered on its rather defective drafting.

In the course of a thorough revision of the first edition, the author has corrected the few anachronisms which it contained. Thus, on page 109, the Serbian who marries in Paris has been replaced by a Greek; but "Palestine" is still referred to as a political entity (on page 6), and (on page 315, note 1) Soviet law is stated as still allowing divorce by unilateral and arbitrary declaration.

Dr. Wolff now qualifies his support of Sir Eric Beckett's view that the question whether a marriage is polygamous or not must be decided by the *lex loci celebrationis*. The situation described on page 320 which is meant to demonstrate the need to consider "all the circumstances of the case," in effect allows the intention of the parties to characterise the marriage, a view rightly rejected on page 318. The monogamous character of a marriage between Scottish people in Pakistan can only be asserted if the law of Pakistan permits monogamous marriages. The rule that a marriage is polygamous even if it is only potentially so is now qualified by the unconvincing suggestion (on page 317) that Jewish marriages in North Africa should only be considered polygamous where a second wife has, in fact, been taken. *Seedat's Case* is criticised because the South African judge wrongly believed that the English test, which looks to the polygamous potentialities of a marriage, had been generally adopted. It would, however, seem more important to point out that the reasons given in that case to deny rights of succession to the first wife ignored the distinction between recognition and enforcement of polygamous marriages, a distinction explained (on page 183) in the terms of Niboyet's doctrine of the degrees of intensity of *ordre public*.

The valuable survey of Matrimonial Property Systems (on page 355 ff.) has now been enlarged by the addition of a new type of "Systems of community upon death." There is an important logical link between matrimonial property law and restrictions on the freedom of testation imposed to protect the family (this seems to be overlooked by the critics of *Re Cooke's Trusts*). But, although connected, the two subjects remain independent. Dr. Wolff uses this new type of matrimonial régime to argue against Dr. Cheshire's view that *Lashley* v. *Hog* was a case turning on testamentary rather than on matrimonial law (page 361). It seems equally unconvincing to treat *legitim* restrictions as a matter of matrimonial rather than testamentary law.

On the subject of nullity of marriage Dr. Wolff no longer maintains, as in the first edition, that a distinction between void and non-existent marriages "is to be found also in English law." With characteristic elegance and economy he now concedes that this is only true of "early English law" (page 80). The implication of this concession appears in the discussion of the domicile of married women. It is now admitted that a void marriage does not change the woman's domicile. This follows from the decision in the *De Reneville Case*, which might have received more ample attention. There may be merits in treating the distinction between non-existent and void marriages rather than that between void and voidable marriages as relevant to the domicile of married women. On the other hand, it seems inconsistent to attack (see page 122) the

rigorous adherence of English law to the principle of unity of domicile between husband and wife and to complain of the independent domicile under a void marriage As for the criticism of the principle of unity, and also of the imperative *locus regit actum* rule in relation to the formalities of marriage (page 843), it must be remembered that these doctrines possess the important, if not decisive, merit of reducing uncertainty which (on page 104) is said to be one of the principal defects of the English conception of domicile.

The discussion of adoption incorporates the changes resulting from the Act of 1949 The author here has relaxed his requirements for the recognition of foreign adoptions. He has, perhaps, not moved far enough in this direction. It must be remembered that there remains the ultimate safeguard of public policy, which is in this context easily identified as concerned principally with the welfare of the infant, see section 5 (1) (*b*) of the Adoption Act, 1950. There are also now statutory restrictions against sending infants abroad for adoption (Adoption Act, 1950, ss. 39, 40) These restrictions constitute by implication some statutory basis for the recognition of foreign adoptions so that it is perhaps no longer entirely accurate to maintain that "the Act is silent on this point" (page 400).

Dr. Wolff has remained an uncompromising defender of the proper law determined "subjectively" by the choice of the parties The recent controversy conducted by Dr. Mann and Mr. Morris in the *International Law Quarterly* has increased the, admittedly academic, interest of the subject. It may, perhaps, be remarked in passing that both the learned disputants seem to have paid insufficient attention to the distinction between contracts containing an express or implied choice of law and those where this matter has not been considered at all by the parties Mr. Morris's contention that the proper law should be determined objectively is particularly convincing if confined to the latter kind of contracts, and, indeed, the modern developments in the English law of Contract which he cites to demonstrate the growing tendency to eliminate fictitious terms, only support his view as far as the latter kind of contract is concerned. Dr. Wolff is rather more conciliatory on this point than Dr. Mann, since he claims for the subjective formula no more than the purely psychological merit of compelling the judge to "visualise the actual parties when determining the proper law." To meet the more extravagant claim of Mr. Morris and the arguments advanced by him in support of the view that the objective test should be applied even where there has been a choice of law by the parties, Dr. Wolff might have drawn more fully upon his discussion of the matter in the *Juridical Review* (Vol. 49, p. 128), in particular in order to show that the agreement of the parties as to the proper law is only "an idea or conception" rather than a contract in the technical sense of internal law or Conflict of Laws.

Mr. Morris's argument that the Conflict of Laws cannot be used to determine the validity of the agreement choosing the proper law, where, for instance, this is attacked on the ground of fraud or mistake, is not met by Dr. Wolff's simple affirmation that the choice of law by the parties is given legal effect by a rule "forming part of the private international law of most countries" (page 414). But the answer to Mr. Morris is implicit in the solution to the example set on page 489 of a contract claimed to be concluded by silence under Scandinavian law. It consists in regarding the choice of the proper law not as a legal agreement but as a purely factual element which, in point of fact, is not established where there is either ignorance or fraud.

When discussing the practically more important problem how to limit the freedom of choice of the proper law, Dr. Wolff maintains, in accordance with the generally accepted doctrine, that the parties are always free to choose the *lex fori* (page 421). But it is *a priori* objectionable to claim any privileges for the *lex fori* in the Conflict of Laws. This explains the general disapproval of the decision in the *Sottomayor Case No.* 2, which is shared by the learned author who condemns it (on page 884) as "an unfortunate exception to the domicile principle." The logical basis of these objections to privileges for the

lex fori is that they violate what is described (on page 202) as "the chief aim of private international law: harmony of decisions irrespective of where the judicial proceedings take place." In connection with the choice of the proper law the concession to the *lex fori* is said to rest "not only on the natural inclination of every judge to apply the law of his country" (an inclination which should not be encouraged as it contradicts ultimately the purpose of the Conflict of Laws) "but also on the rule that parties to a contract can always agree to the jurisdiction of a foreign court" This appears to be equally unconvincing. The unsoundness of deducing choice of law rules from those concerning jurisdiction is now generally admitted (compare Fleming in 8 I.L.Q. 9, especially at page 12). Its danger lies again in that it leads back to the national law of the court. It cannot be the function of the Conflict of Laws to act as guide on these excursions into the interior. The final argument, that "the parties can by agreement make English law applicable by pleading that they agree that the foreign law is identical with English law," amounts to no more than making a virtue of necessity. The quality of this "emergency solution" is clearly analysed in the earlier chapter on the Application of Foreign Municipal Law. There (on page 222) the rule now used to justify privileged treatment of the *lex fori* is said to have the "low rank of an unavoidable though regrettable solution, raised . . . to the dignity of a presumption."

This point is characteristic of the difficulties into which Dr. Wolff is led by seeking to pursue two inherently incompatible aims: to impress the need for an internationalist outlook in this subject and at the same time to encourage a pragmatic and practical approach which mostly leads to the application of the national law of the judge. This contradiction does not necessarily constitute a source of weakness. The readiness to compromise principle with realism may well be claimed to be the essence of that legal wisdom which gives to this work its distinctive quality and which is certain to commend it particularly to English readers.

J. UNGER.

MONEY IN THE LAW NATIONAL AND INTERNATIONAL. By ARTHUR NUSSBAUM. [Brooklyn: The Foundation Press, Inc. 1950. 618 pp. $8.00.]

PROFESSOR NUSSBAUM'S book is a new edition of his *Money in the Law* published in 1939 with substantial extensions of the subject into the international field. Though it is divided into two separate parts: The Law of Money in General and Money in the International Law, the whole volume deals mainly with world problems of money, giving the reader an ample choice of laws and decisions issued by tribunals in the main financial centres of the world. The author has made a serious effort to collect economic and financial material for the purpose of legal analysis; however, simultaneous legal and economic inquiry entails considerable risk. Such an approach may provoke objections from the traditional lawyer or economist who are not yet accustomed to co-operate constructively with each other. Professor Nussbaum's book constitutes a courageous attempt to overcome these difficulties and although he is not in every respect successful with the formulation of problems, his book as a whole is undoubtedly a major contribution to the development of international economic law.

In practice the method adopted by the author presents a few drawbacks. The economic material, which is the basis of legal analysis, is sometimes incomplete or submitted to the reader on the level of an elementary guide into economics. For instance, the gold standard is explained in simple definitions while its essential international implications are overlooked. The economic aspect of other problems is sometimes discussed in the text, while their legal

aspect is dealt with in footnotes only. Sometimes it is the other way round, and this obstructs the welding of legal and economic thought. While the author is fully aware of the differences between public and private law in relation to international problems (Part II), he overlooks the importance of this distinction in Part I. When speaking about the Notion of World Money, the author omits the discussion of the two major present-day efforts to create a world currency, those of Lord Keynes and Harry White in the pre-Bretton Woods Plans.

All these shortcomings are, however, of minor importance in view of the main achievement of the author in giving the reader a wealth of material on money and its behaviour in the national and international field. International lawyers will find in the book valuable explanation of the economic background of money, and economists may become aware of the importance of law for a better and more precise understanding of economic problems. Professor Nussbaum is right in saying that separation of economic and legal thought is too rigorous in Anglo-American learning. He has certainly shown new possibilities of constructive co-operation between the two disciplines.

C. H. ALEXANDER.

REGIMEN INTERNACIONAL DE LOS CONTRATOS. By DR. QUINTIN ALFONSIN. Professor of Private International Law in the Faculty of Laws, Legal Adviser to the Ministry of Foreign Relations. Biblioteca de Publicaciones Oficiales de la Facultad de Derecho y Ciencias Sociales de la Universidad de Montevideo, Seccion III, LIV. [Montevideo: Republica Oriental del Uruguay. 1950. 190 pp.]

ENGLISH and American reviewers of Continental legal works not infrequently criticise civilian writers for setting out what in their view the law should be instead of stating what the law is. If these critics were right, legal science would have to confine itself to the laborious, but supremely modest, task of collecting and systematising the snippets of thought falling off the judicial Bench with no more room for original work than an occasional suggestion for rounding off some rough edges or filling some very minor gap—all such suggestions to be made "humbly" and with a great deal of real or feigned diffidence. No doubt, the author of this work on the private international law relating to contracts would contemptuously refuse to subscribe to this view of the purpose of legal scholarship. Here is a work of some size on the private international law of contracts which not once refers to a decided case, which quotes only on very rare occasions any rule of codified law and which—incredible though this may seem to the adherents of the "state-the-law-that-is" school of thought—is yet of absorbing interest to anybody who is concerned theoretically or practically with the law of Conflict of Laws.

Professor Alfonsin does not attempt to state the law of Uruguay or of any other country as laid down in a Code or in judicial decisions. Nor does he try to describe the outlines of a comparative system. He has set himself the task of considering what doctrine would best cope with the legal, economic, political and logical problems resulting from the conflict of laws in the field of the law of contracts. In performing it he has boldly disregarded all the numerous points of detail, historical accidents, time-honoured traditions and political compromises represented by the actual legal rules adopted in the various countries. Instead of venturing into this maze of facts, fancies and fictions he has devoted himself to examining the various doctrinal solutions which have been proposed by Continental legal writers, in particular by French jurists, and discussed by various international bodies,

in particular the International Law Association and the Rome Institute for the Unification of Private Law.

He divides these theoretical attempts at solving the problem of the conflict of laws in the field of the law of contract into those which propose a national and those which propose an international solution. The former group on its part is subdivided into systems based on a single point of contact, such as the autonomy of the parties, and those which use several points of contact, requiring in every individual case an investigation, which point deserves preference in the instant case. The latter are referred to as "analytical systems," because of the analysis of the case which they require. The former group again either leaves the unity of the contract undisturbed, applying one and the same law to all its aspects, or splits the contract into two parts, applying one law to the rights and duties of one party and another to those of the other. The author discusses one after the other of these various solutions with admirable clarity. His conclusion is that the present tendency of the doctrine of private international law is to prefer a national analytical solution, such as that proposed by Baron Nolde in the Sessions of the Institut de Droit International at The Hague in 1925 and 1927, but that international commerce has already reached a stage of development where such a system, just because it does no more than rendering a national legal system applicable, begins to give insufficient legal protection. The author is, however, very sceptical of the possibility of unifying on an international level either the municipal law or the law of Conflict of Laws. In his view the future lies in the enactment of a dual legislation in each individual State: there is to be one set of rules for national contracts, while a separate set of provisions is to apply to extra-national contracts. This is, in the author's view, not only a stage of development which private international law is just entering in the course of its history. It is far more: it is the final stage beyond which there is no further goal to aim at.

Few of his readers will probably be able to follow Professor Alfonsin in this pessimistic conclusion. Some may even be inclined to question the accuracy of his diagnosis: the evidence in favour of the assumption that there is really a strong tendency for a double-track solution, such as he thinks of, seems to be rather slender. Here—more than in the doctrinal part of his book—Professor Alfonsin seems to have been misled by his exclusive preoccupation with the works and views of academic writers and associations. But the value of his book does not lie in either the diagnosis at which it arrives or the prognosis which it tries to justify. It lies in its clear analysis and sober criticism of the modern theory of private international law. The author might perhaps have made his book more useful and attractive to English and American readers by taking some account of English and American views and writers on his topic. Perhaps he has found that the literature of the common law countries is too much devoted to what Martin Wolff has called the "culling" of private international law "from custom, statutes, precedents and the requirements of the various human communities," and too little to the deontological problems which he had primarily in mind. But it is strange to see so well-informed a writer discussing the theory of the proper law of the contract without any reference to the writings of Cook, Lorenzen and Dean Falconbridge. Even though Nussbaum's remark that the "proper-law-of the contract" doctrine can be considered as one of the outstanding contributions of English learning to this field of legal knowledge, has rightly been dissented from by Dr. Morris, one cannot help feeling that this doctrine would well have deserved far more attention than it has found in Professor Alfonsin's book. The separation of legal thought in the civilian countries from that in the common law countries is perhaps nowhere more regrettable than in this field, where national habits and customs matter so little and needs and the means of achieving them are so much the same everywhere. The recent discussion between Dr. Mann and Dr. Morris would no

doubt have gained in both theoretical profundity and practical usefulness if it had not been so exclusively devoted to discussing arguments proposed in English and American writings. But Professor Alfonsin's book shows that insularity occurs even in a subcontinent whose legal literature is as a rule distinguished by a particularly broadminded cosmopolitanism.

E. J. COHN.

A MANUAL OF INTERNATIONAL LAW. Second Edition. By G. SCHWARZENBERGER. Published under the auspices of the London Institute of World Affairs. [London: Stevens. 1950. lii and 428 pp. 25s. net.]

LAW, in a large way, is a process of correct reasoning, and what appears ultimately more important to a successful student of law is to be able to think and reason for himself, guided, as it were, by the experience of others. While this is true with regard to municipal law, it is particularly so with regard to international law, which operates in a highly dynamic society with frequent changes in the law (in particular, treaty law) and in the situation which the law governs. In this respect, Dr. Schwarzenberger's book is especially valuable in that it guides and stimulates the students to grapple with various problems for themselves, by outlining concisely, in Part I, the general principles of international law, and by setting, in Part II (The Study Outlines), numerous questions ranging from the simple to the controversial, with copious references, given under each question set, to relevant treaties, judicial decisions and literature where the answer may be found. The special features and merits of the book have already been noted by a previous reviewer of the first edition in this journal ((1949) 12 M.L.R. 395–6). The appearance of a second edition, in which the Study Outlines (an invaluable part of the book) have been thoroughly brought up to date, is much to be welcomed.

B. CHENG

THE CUSTOMS UNION ISSUE. By JACOB VINER. [London: Stevens, for the Carnegie Endowment for International Peace. 1950. viii and 221 pp. and (index). 20s. net.]

THIS challenging study of a topical subject deals with the economic, political and legal aspects of customs unions, primarily from the point of view of the economist. The distinguished American economist is sceptical of the economic advantages of customs unions either for the participating countries or for world trade, and considers as unwarranted by experience a widely held belief that customs unions are conducive to closer political unions. The legal aspect of the book is concerned with the compatibility of customs unions or other preferential arrangements with the most-favoured nation standard. The seeming inconclusiveness of this part of the work is due no doubt in large measure to the very nature of the problem the solution of which depends much upon the circumstances of each individual case and the practice of individual States.

The book is the tenth and concluding number of the Carnegie Endowment's series of "Studies in the Administration of International Law and Organisation." It contains, besides a copious bibliography, a list, carefully compiled by the Endowment, of conventions, decrees, and other documents concerning customs unions, beginning with the German *Zollverein*. This list, which also gives the source references of these documents, all available in typewritten form in the Library of the Endowment, should be of much use to lawyers interested in the subject.

B. CHENG.

INCOME TAX TREATIES. (The Income Tax Conventions of the United States with Great Britain, Canada and other countries.) By A. A. EHRENZWEIG, Professor of Law at the University of California and Member of the New York Bar, and F. E. KOCH, DR.JUR., A.C.W.A., Certified Accountant. [Commerce Clearing House Inc., New York 18. 1950. 868 pp. and (index) 16 pp.]

THIS work is primarily written for American income tax practitioners but it should prove useful for those specialists in this country whose work is more concerned with the Double Taxation aspect of income taxation.

After a historical, comparative and analytical introduction to the subject, the learned editors annotate each Article of the U.S.A.–U.K. Double Taxation Convention by special reference to the tax systems of the two countries, so that a British or American practitioner, reading the annotation, is at once seised with the nature of the *other* system he is considering and with which he is not familiar. As an example the annotation of Article II (1 g and h), which deals with "Residence," covers some 15 pages (sections 61–71), and sets out the relevant statutory and case-law of each country together with the official regulations and interpretations relating to residence. This method is followed for the remaining Articles of the Convention.

Your reviewer has carefully examined the section with which he is most familiar, that relating to "residence," and he can report that it is fully adequate, all relevant statutory and case-law being embodied either in the text or footnotes, while the official regulations are quoted verbatim. He has no reason to suppose that the remaining Articles are not as adequately dealt with.

The U.S.A.–Canada Convention is also considered but by way of interpolation (clearly marked) in the text where its provisions on the relevant law differs from those of the U.S.A.–U.K. Convention. The bibliography extends to some 16 pages and the footnotes are a mine of information and learning. Mr. Koch, the co-author, wrote *The Double Taxation Conventions*, reviewed at 11 Mod.L.R. 119. This in itself should recommend the work to all in this country concerned with the impact of American taxation.

A. FARNSWORTH.

DOMAINE PUBLIC ET RES EXTRA COMMERCIUM. By W. G. VEGTING, Professor of Administrative Law in the University of Amsterdam. (Alphen: N. Samsom n.v. Paris: Recueil Sirey. 269 pp. and (Bibliography) 11 pp. and (Tables and Indices) 11 pp.]

THE present book is a translation into French of Professor Vegting's work which first appeared in Dutch in 1946, and was engendered by differences in French and Dutch legal theory. The work is a study of the treatment of things devoted to the public use forming part of the *domaine public* in Roman, French and Dutch law, and of the theories which have been advanced on this topic. In the main the discussion follows the historical development. There is an exposition of the relevant Roman law followed by an account of the discussions of the topic from the time of Justinian to Pothier, and of the specific rules of law in France and the Netherlands both before and after codification. Finally there is an exposition of the law in force and current theories.

The main theme is the nature of the legal relationship of the State to things devoted to the public use—whether or not the State is to be regarded as proprietor—and the precise meaning of the phrase *res extra commercium*. Professor Vegting maintains that in Rome the State was regarded as proprietor, except in regard to *res communes omnium*, as was the Crown formerly

in France, the rules against alienation, etc., being designed to preserve the wealth of the kingdom and being in no sense derived from any special relationship between the Crown and the *domaine public*, but rather from the special position and purposes of the State. The reforms in France of 1790, which he discusses in detail, recognised he asserts this proprietorship. Yet from the nineteenth century he shows how in the courts and in writings, particularly in France, the State has ceased to be regarded as proprietor. This change he regards as mainly attributable to Proudhon and to a confusion springing from a misconception of the source of the rules against alienation and the like. Such rules he maintains did not mean that the State was not proprietor but had other roots already indicated. This process is doubtless accelerated by the increasing divergence between public and private law so that private law concepts are more easily avoided.

The theme may seem a narrow one, yet it has a general interest as one part of the problem of the special position of the State in law. Apart from that there are numerous sidelights of considerable interest, the whole question of inalienability and its collapse in effect, though it is true that contracts relating to the *domaine public* in France must generally be administrative with all the peculiarities which follow. Similarly matters such as the operation of prescription against such lands, the control of the central government over the domain of subordinate organs such as communes are of general interest. Some of these problems are strange to many English readers, others are here obscured by differences of the local law, nevertheless, in reading this book fresh light and fresh thoughts come even on domestic problems.

The book is not always easy to read, sometimes the very detailed care taken in its preparation makes it difficult but that care is nevertheless impressive, and it is a book which contains a great deal of interest. The tables and bibliography in particular are full and useful. If some effort in reading is required it is an effort which is well repaid. If a reviewer may confess that his ignorance of the topic, while not boundless, was considerable he may add that he at least has derived much pleasure and profit from the book.

J. D. B. MITCHELL

HUGO BLACK: A STUDY IN THE JUDICIAL PROCESS. By CHARLOTTE WILLIAMS. [Baltimore: The Johns Hopkins Press. 1950. vii and 208 pp. Price 28s.]

MR. Justice Black is one of the most controversial members of the Supreme Court of the United States. At the time of his appointment in 1937 his early membership of the Ku-Klux-Klan raised an outcry It was in no way lessened by the fact that he stood by while, during the debates on his confirmation, Senators denied his membership, and admitted it only weeks later when his appointment was confirmed, and the evidence had become overwhelming; even Miss Williams describes his attitude during this period as "the nearest thing . . to studied deceit," and her explanation that "he must be judged in the light of all the circumstances and as a man rather than a demi-god" (p. 67), is hardly apt to appeal to men. On the other hand, when in 1946 Mr. Justice Jackson thought fit publicly to attack his colleague on the (from the English point of view wholly tenuous) ground that he had taken part in the hearing of a case argued by a former partner, his dignified silence, as Miss Williams justly says, was indeed "to the everlasting credit of Justice Black's good sense and self-control" (p. 188) Altogether, a judicial career which opened with such misgivings, seems later to have provoked widespread satisfaction. At any rate, an English lawyer cannot help being greatly impressed by the character and language of some of Mr. Justice Black's opinions, which show no trace of the spirit of the Ku-Klux-Klan, but on the

contrary disclose a liberalism and respect for Equal Justice Under Law that is wholly in line with his court's great tradition.

Miss Williams duly emphasises this point in the course of her description of the contributions made by Mr. Justice Black to American legal thought and practice. Whether her study in fact achieves its purpose of assisting in "a general appraisal of the trend and temper of constitutional theory during a stormy decade," is a question which only an American lawyer can answer. A foreign observer must diffidently doubt whether the answer will be an unqualified affirmative. But, as Miss Williams herself realises, the time may not yet be to undertake, or even prepare for, that task.

F. A. MANN.

UEBER DIE OBJEKTIVITÄT DER RECHTSPRECHUNG. By OTTO BRUSIIN, Lecturer at the University of Helsinki. [Helsinki: J. Simelius-sen Perillisten Kirjapaino Oy. 1949. 122 pp.]

DR. BRUSIIN'S essay is devoted to the interesting question what factors promote objectivity in the activities of courts of law. Unfortunately it cannot be said to have advanced the matter to any considerable extent A problem of this kind can, of course, be dealt with on a popular level by enumerating and briefly discussing some of the institutions, rules, habits and customs which in one or more individual countries have assisted in promoting objectivity. But a scientific treatment of such a question demands infinitely more than that It requires comprehensive comparative studies combined with an intensive fact research. Dr. Brusiin offers neither the one nor the other. The extent to which this omission has affected his work can be easily demonstrated. The lack of comparative research has led him to overlook entirely the work of the American realist school—a school which has made his very topic the centre of its legal thinking. It has made him write a sentence like this: "The principle of judicial independence is scarcely (!) weakened by the rule of the binding force of former decisions, provided the requirements for this binding force are laid down objectively in rules of law which are actually in force" (p. 20). The lack of fact research has deprived many of his references to individual rules and institutions of their real value. Thus he assures us that it is quite wrong to assume that the courts of the Soviet Union were not striving for objectivity But the sole ground for this sweeping condemnation of a view adopted by more than one competent observer is an article in the *Constitution of the Soviet Union of 1936* (p 88). No attempt is made at investigating the relationship between Soviet legislation, Soviet legal theory and Soviet legal practice. One can only regret that the author has not chosen a more realistic approach to his problem. If he had done so, he would have recognised that the conceptionalist introduction with which his book opens is quite unnecessary and, that, if a "theoretical" introduction was at all required, an investigation of the ethical meaning of objectivity, the psychological limits of achieving objectivity and the jurisprudential limits of its desirability would have been much more worth while than the dry and unconvincing propositions of his first chapter.

E. J. COHN.

OUTLINES OF MUHAMMADAN LAW. By ASAF A. A. FYZEE. [Calcutta: Geoffrey .Cumberlege, Oxford University Press. 1949. xvi and 448 pp. 27s. net.]

THE reviewer has no special knowledge of Mohammedan law and this review, therefore, is that of a layman. He has read Professor Fyzee's book with great

interest and found it fascinating. It is, to a Western lawyer, a clear and very readable account of a new and, in many ways, strange subject In this connection the historical introduction which gives an account both of the background and of the development of Islamic law is particularly valuable.

The subject is particularly interesting when viewed in relation to its sociological background and when viewed from the angle of comparative law. The fundamental problems to which any legal system must find the answers, are largely the same the world over, and a comparative investigation of family law, the law of succession or the law relating to wakf (an institution related to, but different from charitable trusts) should prove interesting and fruitful. This is true of the problems arising from the limits of the applicability of Mohammedan law in India also.

The reviewer lacks the knowledge to discuss the learned author's treatment of any individual topic, but the exposition appears to him lucid and as comprehensive as is suitable in an elementary work, and the book can be recommended as an introduction to a subject too little known in the West.

W. A. STEINER.

THE TRIAL OF PETER GRIFFITHS. Edited by GEORGE GODWIN. Notable British Trials Series, Vol. 78. [London: William Hodge & Co., Ltd. 1950. 219 pp. 15s.]

THIS is the trial of a twenty-two-year-old ex-Irish guardsman who, after stealing a girl of less than four years of age from her cot in a Blackburn hospital and criminally assaulting her with almost inhuman ferocity, eventually killed his victim by bashing her head against a stone wall in the hospital grounds. It is chiefly of interest as illustrating the working of the M'Naghten Rules in the courts at the present moment, a subject now under consideration by the Royal Commission for Capital Punishment.

The prisoner was admittedly of low intellectual capacity and there was a considerable amount of evidence which seemed to indicate that he was, by heredity, suffering from a serious disease of the mind, schizophrenia. Since he had, however, shown clear recollection of his actions, the defence found it extremely difficult to prove that he did not know what he was doing or that what he was doing was wrong, and the jury rejected the plea of insanity. In the Introduction Mr. Godwin, the editor, not unnaturally takes a poor view of the prevailing system which led to the execution of a man whom three of the four doctors, examined as expert medical witnesses, described as suffering from a defect of the mind. For this reason he has added, as an Appendix, a paper in which Dr. C. Stanford Read, Consulting Psychiatrist to the West End Hospital for Nervous Diseases, discusses "Schizophrenia and other mental disorders of medico-legal import." Dr. Read produces neither infallible symptoms for diagnosis nor a panacea for treatment of such abnormalities as are here involved, but what he says, though necessarily concise, is valuable as indicating the considerable progress which psychopathology has made in the past 100 years.

A strong case can, however, certainly be made against the present practice which, instead of calling for an impartial and objective expert report which the jury might consider like all other evidence, requires the defence to establish insanity by calling such medical witnesses as it can find. As a result, more often than not, two opposing sets of experts, one for the prosecution and the other for the defence, are seen, like in this case, wrangling in court over complicated problems of psychopathological science and putting forward conflicting hypotheses from which the jury must draw such conclusions as it can.

It is striking that this case which, with the first mass employment of finger-printing in this country (prints were taken from all males in the Blackburn area, 46,000 in all, and nearly ten million comparisons were made in

order to trace the murderer), marks an important step forward in scientific crime investigation, shows up, at the same time, some almost archaic traits of our substantive and procedural criminal law. Mr. Godwin opines that "the trial of Peter Griffiths may appear to the reader of this trial fifty years hence as strange as the records of the trials of the New England witches." He may be right.

H. A. H.

Books and other publications received :—

THE LEASEHOLD PROPERTY (TEMPORARY PROVISIONS) ACT, 1951. By T. J. SOPHIAN, of the Inner Temple, Barrister-at-Law, and G. E. LLEWELLYN THOMAS, of the Middle Temple, Barrister-at-Law. [London : Sir Isaac Pitman & Sons, Ltd. 1951. x and 84 pp. 12s. 6d.]

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THE MODERN LAW REVIEW

Volume 15 April 1952 No. 2

INCONSISTENCIES AND INJUSTICES IN THE LAW OF HUSBAND AND WIFE

"THE state of the law today as to the relations of husband and wife seems to me to be fraught with inconsistency and injustice." [1] The words were spoken in 1930. Four years later, in January, 1934, the Lord Chancellor, Lord Sankey, appointed the Law Revision Committee, and one of its terms of reference was "the liability of the husband for the torts of the wife . . . and the liability of a married woman in tort and in contract. . . ." Of the many "injustices" and "inconsistencies" of this branch of the law only two were thus subjected to the scrutiny of the Committee. Its task was to examine the effect of two decisions: *Edwards* v. *Porter* [2] and *Scott* v. *Morley*.[3] The major problems of the general effect of marriage on the property of the spouses and on their mutual relations in matters such as property, contract and tort were not included in the terms of reference, nor was the equally important question of the position of outsiders, and in particular of creditors, with regard to property transactions between husband and wife. Nevertheless the recommendations of the Committee [4] and the Law Reform (Married Women and Tortfeasors) Act, 1935, Part I, which carried them into effect, constituted a frontal attack on some of the fundamental problems of the law of husband and wife. The Act abandoned the traditional method [5] of dealing with the question of married women's property by extending the equitable conception of the "separate estate." For the first time it gave effect to the three basic principles of equality of status and capacity, of separation of property, and of separation of liabilities. Its "dominant intention" was indeed "clear beyond all doubt." It was "to effect

[1] *Per* McCardie J. in *Gottliffe* v. *Edelston* [1930] 2 K.B. 378, at p. 381.
[2] [1925] A.C. 1.
[3] (1887) 20 Q.B.D. 120.
[4] Law Revision Committee Fourth Interim Report, Cmd. 4770/1934, No. 23, p. 12.
[5] This method was employed in the Married Women's Property Acts of 1870 and of 1882, but the modern method was used in s. 21 of the Matrimonial Causes Act, 1857, which is still in force, and in s. 26, which became s. 194 of the Judicature Act, 1925, and the last vestiges of which can now be found in s. 21 of the Matrimonial Causes Act, 1950.

a drastic reform of our law in a branch where there has been too much legal fiction and too much technicality of legal procedure." [6] Whether it succeeded in making "a clean sweep of the old fiction of our common law that a woman on marrying became merged in the personality of her husband and ceased to be a fully qualified and separate human person," [7] is a different question. The Act made no attempt to reform the law on mutual dealings and liabilities between husband and wife. On the contrary, it expressly reaffirmed one of the basic statutory provisions in this matter which was itself an outcome of the doctrine of "unity of husband and wife," [8] and in the law of evidence, in criminal law, in the conflict of laws, and in some branches of the law of tort that doctrine continues to have its important consequences to this day.[9] In spite of appearances, therefore, the Act of 1935 is not a codification of the law of husband and wife, it is not even a codification of the "property aspect" of this branch of the law. It is no more than an unusually radical amendment of certain rules of the common law. It has left in being many of the anomalies of which McCardie J. complained more than twenty years ago, and it is the object of this paper to deal with three of them: those concerning the mutual liabilities of husband and wife, especially in tort, those affecting the position of the wife with regard to savings, and those encroaching upon the rights of creditors in connection with gifts and other transfers of property between the spouses.

Before these matters can be discussed, it is however necessary to say a word about a point of principle which must be indicated but which cannot be fully analysed in this article. The two rules of equality of status and capacity and of separation of property between the spouses are linked in the Act of 1935, as, in a way, they were linked in its predecessor, the Married Women's Property Act, 1882. This is no more than an historical accident. The two rules are quite distinct. A system of equality between the legal status of married women and that of unmarried women and of men is compatible with a matrimonial régime of joint property of the spouses, as in France,[10] or of the husband's right to enjoy the income of, and his power and duty to administer, the wife's property, as in Germany.[11] In this country the common law

[6] *Per* Scott L.J. in *Barber* v. *Pigden* [1937] 1 K.B. 664; [1937] 1 All E.R. 115, 125.

[7] *Per* Scott L.J., *ibid.*, and, similarly, in *Rees* v. *Hughes* [1946] K.B. 517; [1946] 2 All E.R. 47, 50.

[8] Married Women's Property Act, 1882, s. 12; see s. 1 and both Schedules of the 1935 Act.

[9] See Glanville Williams, "The Legal Unity of Husband and Wife" (1947) 10 M.L.R. 16.

[10] *Code Civil*, art. 1401, but it does not extend to land belonging to either spouse at the time of the marriage or subsequently acquired by gift or inheritance, art. 1404, 1405.

[11] *Buergerliches Gesetzbuch*, para. 1363; for the most important exceptions see paras. 1366, 1367.

refused to give the wife any capacity to make contracts in her own name while the marriage lasted. This rule was perhaps less the outcome of a general theory of the *fragilitas muliebris sexus* [12] (which may probably be said to have had a greater effect on equity than on the common law) [13] than of the need for preventing persons incapable of disposing of, and to some extent even of owning, property, from incurring liabilities which, in the absence of assets, would have been unenforceable in practice. In other words: the effect of marriage on the property of the spouses was, at common law no less than in those nineteenth and twentieth century statutes which amended it, linked with the status of a married woman, but one may venture to assume that the rules as to status resulted from those as to property and not vice versa. The "liberation" of the married women of the propertied classes which equity brought about was, as Dicey clearly demonstrated, only an incidental result of the Chancellor's desire to preserve her property for the wife and her clan or next-of-kin, and not informed by any principle of the equality of the sexes.[14] When, under the influence of social transformations and of a rapidly changing public opinion,[15] the inequality of status between married women and other citizens became intolerable, it was in people's minds connected with the domination the husband exercised at common law over his wife's property. In the process of giving to women the legal status which reflected their position in society, English law adopted, almost by accident, a régime of "separation of goods." This régime has its advantages, but it also has its very great disadvantages, and to emphasise the latter does not mean in any shape or form to question the need for, and the justice and wisdom of, the rule of equality of status and capacity.

As the law stands today, husband and wife face each other in matters of property like strangers. The fact that they are husband and wife has no effect on their property. Nothing is by law "theirs," everything, from the kitchen cupboard to the savings bank account, and from the family car to the matrimonial home itself, is, in the absence of an express agreement to the contrary,[16] either "his" or "hers." Sociologists must decide whether this legal rule reflects the *mores* and ideas of the people. It is strongly suspected that it does not. Where husband and wife live together in amity (a situation which is perhaps more often brought to the notice of social scientists than to that of lawyers in the course of

[12] The words are Justinian's: I. 2, 8, pr. How much Roman Law did Shakespeare know? (Hamlet I, 2). Or is this a "Baconian" point?

[13] Although Parker J., in *Johnson* v. *Clark* [1908] 1 Ch. 303, 317, called the restraint on anticipation "a tribute on the part of Courts of Equity to the wisdom of the common lawyers."

[14] Dicey, *Law and Public Opinion in England*, Lecture XI.

[15] J. St. Mill's *Subjection of Women* was published in 1869, the first Married Women's Property Act was passed in 1870.

[16] See s. 4 (2) (*c*) of the 1935 Act.

their professional activities) what predominates is the unity of the household, the existence of what Lord Halsbury called the "common family fund"[17] and Goddard L.J. (as he then was) the "common establishment."[18] Social insurance and family allowances legislation[19] as well as income tax law[20] have translated this social phenomenon into legal norms, but the Act of 1935 ignores it. Earlier legislation, like the common law, had, consciously or unconsciously, given effect to the unity of the household, although it did so in part in a way which is unacceptable in our time. But nature, driven out with a pitchfork, comes back. Despite the separation of property of husband and wife, the merger of many of their worldly possessions is and remains a fact. Grave injustices and no less grave inconsistencies result today from this clash between what happens in fact and what the law supposes to happen. Others are inherent in the survival of legal rules based on an antiquated conception of the unity of the household. The victims are not always the spouses themselves, but equally often those who enter into transactions with either of them or who suffer from their wrongful conduct.

I

MUTUAL LIABILITIES OF HUSBAND AND WIFE

Contractual and quasi-contractual liability

As already mentioned, the Act of 1935 did not expressly deal with the mutual liability of husband and wife. In this respect the rules of the common law and those of previous legislation, especially the Married Women's Property Act, 1882, continue to be of practical importance. This, however, has less significance with regard to contractual and quasi-contractual liabilities between the spouses than in connection with the law of tort.

It may nevertheless be useful to remind ourselves that the common law doctrine of the legal unity of husband and wife had, in relation to contracts between them, three different aspects:

(1) A man was unable to contract with his wife during marriage, for "to covenant with her would be to covenant with himself."[21] Thus, a contract between husband and wife was void for two reasons: on the ground that a married woman had no contractual capacity at all, and on the ground that a man cannot contract with himself.

[17] *Main Colliery Co., Ltd.* v. *Davies* [1900] A.C. 358, 361.
[18] *Youngs* v. *Youngs* [1940] 1 K.B. 760; [1940] 1 All E.R. 849, 854.
[19] Family Allowances Act, 1945, s. 1, s. 4; the acquisition by the wife of a right to certain maternity benefits, to widow's benefit and retirement pension through the husband's contributions (National Insurance Act, 1946, s. 14 (1), s. 17 (1), s. 21) is but one of many manifestations of the "family fund" principle in this branch of the law.
[20] Income Tax Act, 1918, All Schedules Rule 16, proviso (1).
[21] Blackstone, *Commentaries*, Book I, Chap. 15; 1st ed. (1765), p. 442; 18th ed. (1821), p. 504.

(2) Contracts "made between husband and wife, when single, are voided by the inter-marriage." [22]

(3) During marriage a husband could not sue his wife nor a wife her husband. This rule belonged to the law of procedure, not to the substantive law. It followed not only from the general doctrine of unity, but also from the more special doctrine that a married woman could, exceptions apart, neither sue nor be sued without the husband being made joint plaintiff or joint defendant.[23]

The Married Women's Property Act, 1882, abolished the first of these rules. It did so by the—now repealed [24]—section 1 (2), by which "a married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract. . . ." It was not open to serious doubt that "any contract" included a contract with her husband,[25] and contracts between husband and wife began, soon after the coming into force of the Act, to be enforced by the courts, even outside the limited field in which equity would have enforced them.[26]

The procedural principle against actions between husband and wife, the third of the rules mentioned above, was also swept away by section 1 (2) of the 1882 Act by which a married woman was made "capable . . . of suing and being sued, either in contract or in tort, or otherwise. . . ." This clearly covered proceedings against or by her husband who did no longer have to be joined as plaintiff or defendant in actions brought by or against her. On this there cannot be, nor does there ever seem to have been, any doubt.[27]

The result was that, as regards contracts made during marriage, the common law doctrine of unity and its sub-rules ceased to apply altogether. This remains true under the Law Reform (Married Women and Tortfeasors) Act, 1935. The place of section 1 (2) of the 1882 Act has been taken by section 1 (*b*) and (*c*) of the 1935 Act according to which "a married woman shall be capable of rendering herself, and being rendered, liable in respect of any . . . contract, debt or obligation" and also of suing and being sued

[22] Blackstone, *ibid.*

[23] Lush, *Husband and Wife*, 4th ed. (1933), pp. 578 *et seq.*

[24] Law Reform (Married Women and Tortfeasors) Act, 1935, s. 5; Second Schedule.

[25] *Lush*, pp. 281 *et seq.*

[26] *Butler* v. *Butler* (1885) 16 Q.B.D. 374. The three judgments in the Court of Appeal did not rest on the construction of s 1 (2), but on the rule of equity that a married woman could contract with her husband with regard to her separate estate and on the extension of that rule to all property which, under the Act of 1882, had become the wife's separate estate by statute. See especially *per* Lord Esher M.R. at p. 376, and *per* Cotton L.J. at p. 378. It is interesting that, on the obvious rule that in equity the spouses could enter into valid contracts concerning the wife's separate estate, no case was, according to Lord Esher, "precisely in point." In this branch of the law much is taken for granted, and it is not always easy to give chapter and verse for legal rules the existence of which is not doubted by anyone.

[27] *Lush*, pp. 579 *et seq.* The learned author was of the opinion that this result was reinforced by s. 12 of the Act.

"in all respects as if she were a feme sole." This point raises no problem.

While thus the artificial rule of unity has disappeared as far as post-nuptial contracts between the spouses are concerned, the unity of the household as a fact has remained. In the law of contract the Court of Appeal recognised the existence of this natural or social unity in the celebrated case of *Balfour* v. *Balfour*.[28] Transactions which, as between strangers or as between spouses living apart, would be contracts, do not necessarily have that character if entered into between husband and wife where the marriage is a "going concern." This is so, not because any legal doctrine would prevent the agreement from being a contract but because the parties cannot be assumed to have intended to create legal relations. "Agreements such as these are outside the realm of contracts altogether. . . . In respect of these promises each house is a domain into which the King's writ does not seek to run, and to which his officers do not seek to be admitted."[29] *Balfour* v. *Balfour* is one of those wise decisions in which the courts allow the realities of life to determine the legal norm which they formulate. Its ruling has in no way been affected by the Act of 1935.

It is when we come to pre-nuptial contracts, to the second of the three common law rules enumerated above, that we enter the realm of speculation. Did husband and wife, under the 1882 Act, continue to be liable towards each other on contracts entered into before marriage or in respect of quasi-contractual liabilities incurred while they were single? As regards the husband's liability to the wife, it is said[30] that it continued during marriage as a result of section 12 of the 1882 Act, according to which a married woman has against all persons, including her husband, the same civil remedies for the protection and security of her property as if she were a feme sole. This presupposes that every contractual claim is a means of protecting or securing property, and, although this is not free from doubt in all cases, it will be true of the vast majority of all contracts. Section 12 is still in force, and since, as will be submitted presently, a married woman is now liable to her husband on pre-nuptial contracts and quasi-contracts, the view that the husband is liable by virtue of section 12 should be accepted in the interest of "mutuality," although the interpretation of the section on which it rests may, in some exceptional instances, be assailable on theoretical grounds.[31]

[28] [1919] 2 K.B. 571.

[29] *Per* Atkin L.J. at p. 579.

[30] *Chitty on Contracts*, 20th ed., Chap. XIV, p. 661.

[31] It would be difficult to assert that, *e.g.*, a contract by which the future husband, a famous painter, undertakes to give lessons to his future wife, is a contract concerning her property. The problem whether nevertheless an action on the contract would be a remedy for the protection and security of her property because the contractual right is a chose in action will be discussed below in connection with torts.

The Act of 1882 did not, however, abolish the rule of the common law that a married woman was not liable to her husband on pre-nuptial contracts and quasi-contracts. Thus, a husband was unable to recover a loan granted before marriage to his future wife or money then paid on her behalf at her request.[32] There does not appear to have been any decision on this point since the passing of the 1935 Act. It is submitted that the Act has changed the law laid down in *Butler* v. *Butler*, but in order to prove this point it is necessary to analyse in some detail the reasoning of the judgment of Wills J.

The learned judge rejected an argument advanced by counsel for the husband that the 1882 Act had destroyed the doctrine of unity of husband and wife.[33] This part of the judgment was not only indubitably correct under the 1882 Act,[34] but would be equally correct today under the 1935 Act.[35] He further adverted to the provisions of the Act of 1882 in detail. In particular he considered whether section 18 of the Act had made a married woman liable for contractual and quasi-contractual debts incurred before marriage towards her future husband. Section 18 said (and says) that, after her marriage, a woman continues to be liable "for all debts contracted, and all contracts entered into or wrongs committed by her before her marriage." Did this include debts contracted to, and contracts entered into with, her future husband? The judge answered the question in the negative. For this he gave three reasons, only one of which can apply now in view of the amendment of the 1882 statute by the 1935 Act. In the first place, he said, if section 18 covers liability towards the future husband, it must do so not only in the law of contract but also in the law of tort ("wrongs committed"). Yet this delictual liability is expressly negatived by the immediately preceding section 12. Had section 18 contemplated liability between the spouses, it would have contained some reference to the preceding section. This part of the argument continues to apply under the present law, unless there is some other provision in the 1935 Act which outweighs it. In the second place, Wills J. referred to an additional provision in section 18 which is now repealed.[36] According to this, the wife's separate property was, as between her and her husband, primarily liable for her pre-nuptial indebtedness. This, of course, would not have made any sense in connection with liabilities between the spouses. Thirdly, Wills J. observed that section 18 had to be read in conjunction with the (now repealed) sections 14 and 15[37] which were only applicable to liability to strangers. This third point,

[32] *Butler* v. *Butler* (1885) 14 Q.B.D. 831. There was no appeal against this part of the judgment of Wills J.
[33] At p. 836.
[34] *Edwards* v. *Porter* [1925] A.C. 1.
[35] *Baylis* v. *Blackwell* [1952] 1 All E.R. 74.
[36] 1935 Act, Second Schedule.
[37] *Ibid.*

too, has now lost its validity. Of the "liberating" section 1 (2) of the 1882 Act he merely said that it was purely procedural, which was incorrect because this enactment not only gave the married woman the capacity to sue and to be sued by herself, but also the capacity to contract.

Nevertheless, even if the judge had examined the substantive element in section 1 (2) of the 1882 Act, he might not, as the law then stood, have arrived at any other decision. That provision merely enabled the married woman to enter into and to render herself liable on any contract, and, even without the addition "in respect of and to the extent of her separate property" this would have referred only to such contracts as were made during marriage. It is here that the 1935 Act has made a change. Section 1 (*b*) makes a married woman capable not only of rendering herself liable in contract, but also of "being rendered liable," as if she were a feme sole. These additional words would seem to cover the case of the woman being rendered liable on debts incurred prior to marriage. Her liability to strangers is covered by the unrepealed part of section 18 of the 1882 Act, but section 1 (*b*) of the 1935 Act appears to be applicable to the wife's pre-nuptial debts towards her husband. Since this enactment is expressly "subject to . . . the provisions of section 12" of the 1882 Act, it does not contradict the principle that a man cannot sue his wife for pre-nuptial torts.[38] In other words: the new Act equates the married woman's liability to that of an unmarried woman not only by laying down her capacity, during marriage, to enter into contracts, but also by regulating her contractual liability during marriage without any reference to the time when it was incurred. The rule in *Butler* v. *Butler* is thus removed, and a married woman rendered liable for debts incurred to her husband before marriage, and this is, as need hardly be emphasised, in the spirit of the Act of 1935 and of modern legislation as a whole.

Perhaps this laboured analysis of the comparatively simple problems of contractual liability will have convinced the reader of this article that the legislator of 1935 might have been well advised to strike at the root of the matter, *i.e.*, at the common law rule of unity, instead of lopping off one or two of the branches of the tree. This impression will be strengthened by the following discussion of the law of tort.

Liability in Tort: The Rule

It is apposite, as in the case of contracts, to distinguish between the substantive and the procedural aspects of the doctrine of unity at common law. Two rules, it is submitted, should be clearly kept apart:

[38] The learned editor of the chapter on "Contracts with Married Women" in *Chitty on Contracts*, 20th ed., p. 662, arrives at the same result, but along a different line of reasoning.

(1) No act committed by one spouse against the other during marriage could be a tort.[39]

(2) Neither spouse could sue the other during marriage or continue, during marriage, proceedings started before.[40]

The first of these rules precluded any claim in respect of a wrongful act alleged to have been committed during marriage by the husband against the wife or by the wife against the husband, no matter when the claim was raised. It made it impossible for the husband to claim, against his deceased wife's estate, damages for a tort alleged to have been committed by her, even in so far as the case would have come within those exceptions which the common law had grafted upon the rule *actio personalis moritur cum persona*. The same would have been true of a similar claim made by the widow against the husband's estate, or by the personal representative of either spouse against the surviving spouse. The present writer has been unable to find an actual decision to this effect, but the matter is put beyond all doubt by *Phillips* v. *Barnett*[41] where a woman's attempt to sue her husband after divorce for an assault alleged to have been committed during the marriage was defeated by the rule of the common law against tortious liability between husband and wife. It was the substantive rule alone and not the procedural rule which determined the matter, because the action was not one between husband and wife.

The second, *i.e.*, the procedural, rule made it impossible for either spouse to sue the other in tort as long as they were married, irrespective of whether the tort was alleged to have been committed before or during marriage. It is impossible to say whether marriage destroyed, as a matter of substantive law, the right to recover damages for a pre-nuptial tort which at the time of the marriage was vested in either spouse against the other. The question did not arise because the procedural principle sufficed to determine the issue. Had there at common law been a rule about contribution between tortfeasors similar to the one now enacted in Part II of the Law Reform (Married Women and Tortfeasors) Act, 1935, the question might conceivably have arisen. It might have been necessary for a court to decide whether, *e.g.*, a third party sued for a tort alleged to have been committed against the wife before her marriage could have claimed contribution from the husband as a joint tortfeasor. This would not have been an action between husband and wife for the pre-nuptial tort, and it would have been for the court to say whether the husband's substantive liability to his wife on which the third party would have relied had been extinguished by the marriage. But all this is purely hypothetical, and it would be unprofitable even to mention this problem, were

[39] *Phillips* v. *Barnett* (1876) 1 Q.B.D. 436.
[40] Note 28, *supra*.
[41] *Ubi supra*.

it not for the fact that the common law rules have, to a considerable extent, survived the legislation of 1882 and of 1935.

The Married Women's Property Act, 1882, gave no general ruling on a married woman's substantive rights or liabilities in tort,[42] comparable to the principle on contractual liability enacted in section 1 (2). There was no reason why it should have done so. The Act was not a codification, but a measure to amend the common law, and where the common law did not seem to be in need of amendment, the statute was silent. At common law a married woman was capable of rendering herself liable in tort (although the husband was also liable), and no enactment was required in order to confer delictual capacity upon her. She was also capable of acquiring delictual rights, as she was capable of acquiring other choses in action,[43] but the power of reducing the chose of action to possession vested in the husband. That power was removed by sections 2 and 5 of the Act. Hence, as regarded a married woman's delictual rights against, and liabilities towards, strangers, all that remained of the common law after the 1882 Act was the rule that the husband was liable for his wife's torts, a rule abolished by section 3 of the Act of 1935.

The common law rule against tortious liabilities between husband and wife, however, did not rest on any delictual incapacity of the wife or (in so far as the husband's torts were concerned) on her inability to dispose of choses in action. It was a direct outcome of the rule of unity. This independent rule that there could be no tort between the spouses was left intact by the Act of 1882,[44] subject to an exception with reference to torts committed by the husband against the wife's property. This will be discussed below.[45]

So much, then, as regards the fate of the substantive common law rule under the 1882 Act. The procedural rule against actions between husband and wife in tort would have been removed by section 1 (2) of the 1882 Act, had it not been expressly re-enacted by section 12. The provision that a married woman was to be "capable . . . of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a feme sole," was, as pointed out above, sufficiently wide to cover actions in contract between husband and wife.[46] By parity of reasoning it was also wide enough to include actions between spouses in tort. Had it not been for section 12, husband and wife would still, as a result

[42] *Hæ abundantis cautela*, it seems, s. 18 lays down that a married woman remains liable for pre-nuptial torts.

[43] A delictual right is a chose in action within the meaning of s. 24 of the 1882 Act and therefore "property." It is submitted that, in so far, the decision of the Court of Appeal in *Curtis* v. *Wilcox* [1948] 2 K.B. 474 is correct, and that, on this point, the decision of McCardie J. in *Gottliffe* v. *Edelston* [1930] 2 K.B. 378 was wrong. See *infra*, p. 151.

[44] *Phillips* v. *Barnett*, *supra*, is still considered as law: see *per* Slesser L.J. in *Fender* v. *Mildmay* [1936] 1 K.B. 111, 125 *et seq.*; Salmond, *Torts*, 10th ed., p. 67; *Lush*, p. 588.

[45] s. 12 of the 1882 Act.

[46] *Supra*, note 27.

of the substantive rule against tortious liability arising during marriage, have been prevented from suing each other for post-nuptial torts, but they might have sued one another for torts alleged to have been committed before marriage. The relevant words in section 12 are: "no husband or wife shall be entitled to sue the other for a tort." It can hardly be doubted that Lush [47] is right in saying that this part of section 12 is an exception to the procedural provision in section 1. Thus the procedural rule against actions between the spouses in tort would have passed into legal history had it not been expressly formulated in section 12. At the same time, however, the words "no husband or wife shall be entitled to sue the other for a tort" have also to be construed as a statutory reaffirmation of the common law rule against substantive liability. This was, *e.g.*, the attitude of Hallett J. in *Chant* v. *Read*.[48] Moveover, this view receives support from the construction of the exception to the rule, which refers to the woman's remedies for the protection and security of her property and which will be discussed below. On this view, section 12 embodies two rules: a substantive rule reiterating a principle of the common law, and a procedural rule creating an exception to the abolition, by section 1 of the Act, of another principle of the common law.

It is unnecessary to mention all the decided cases in which either a husband or a wife suffered defeat, as a result of the section, when attempting to make the other spouse liable in tort: be it sufficient to mention, on the one hand, *Webster* v. *Webster*,[49] where the husband tried in vain to obtain against his wife an injunction to restrain her from pledging his credit (conduct which, in the circumstances, would have been tortious), and *Ralston* v. *Ralston*,[50] on the other hand, as an example of a case in which the principle of the section was invoked by the husband against the wife, with the result that her action for libel against him was dismissed.

The Law Reform (Married Women and Tortfeasors) Act, 1935, made no change in this aspect of the law of husband and wife. The Law Revision Committee was hamstrung by the narrowness of its terms of reference, or, in any event, by the interpretation it gave to these terms. It did not consider that "the liability of a married woman in tort and in contract" covered her liability towards her husband. Hence it made no recommendation on this point. It proposed [51] a verbal and consequential amendment of section 12 of the 1882 Act (which was carried into effect by the Act of 1935 [52]), and further suggested, *sotto voce*, as it were, that

[47] p. 581, and see *per* Rowlatt J. in *Webster* v. *Webster* [1916] 1 K.B. 714.
[48] [1939] 2 K.B. 346; [1939] 2 All E.R. 286.
[49] *Supra*, note 46. The case is of very great interest from the point of view of the question whether there is a general "innominate" tort.
[50] [1930] 2 K.B. 288.
[51] Cmd. 4770/1934, p. 12.
[52] First and Second Schedules

" when amending the section it may be thought desirable to give to a husband similar rights in respect of his property to those given by the section (as amended) to a wife in respect of her property. There may also be those who think it desirable further to amend section 12 by omitting the words ' except as aforesaid no husband or wife shall be entitled to sue the other for a tort.' " However, these matters were regarded as outside the terms of reference.

The draftsman or the legislature did not take the hint of this *obiter dictum*. On the contrary : section 1 of the 1935 Act which deals with the status and capacity of a married woman is " subject, as respects actions in tort between husband and wife, to the provisions of section 12 of the Married Women's Property Act, 1882." Thus the section is still with us, and, as a number of recent cases has shown, very much alive. That the question of the delictual liability between husband and wife has been so much in the legal " news " in recent years is obviously due to the fact that, in these cases, the spouses are often the parties to the dispute in no more than a formal legal sense. The practical importance of the problem arises frequently because on one side, usually that of the person liable, the interested party is an outsider, the insurer against third-party risk. Where one spouse causes an accident against the consequences of which he or she is insured by a third-party risk policy, and the other spouse, the victim of the accident, holds an accident policy, we may well get the edifying spectacle of two insurance companies facing each other as husband and wife by virtue of subrogation.[53] The fact that the insurer or insurers is or are interested parties has, of course, no legal significance whatsoever. Nor, as will be shown presently, would it be correct to say that, under modern conditions, the absurdities created by section 12 can only be discerned in accident cases.

That attempts should have been made to argue that *cessante ratione legis cessat lex ipsa*, is not surprising. Again and again counsel have tried to convince the courts,—and always in vain,—that the whole body of legislation on married women should be understood as a removal of the doctrine of unity and all its excrescences. The courts have invariably resisted such efforts to make them do the work of the Legislator. The decision of McNair J. in *Baylis* v. *Blackwell*[54] is only the last link (for the time being) in a chain which includes *Butler* v. *Butler*[55] and *Edwards* v. *Porter*.[56] The learned judge resisted the temptation to hold that " the process of encroachment or erosion has now, and, in particular, by the Law Reform (Married Women and Tortfeasors) Act, 1935, been carried

[53] In an accident policy there would, of course, have to be an express clause providing for subrogation which does not operate *ipso jure* in non-indemnity insurance.

[54] [1952] 1 All E.R. 74.

[55] (1885) 14 Q.B.D. 881.

[56] [1925] A.C. 1.

so far as to sweep away the last remnant of a wife's dependency on the husband and to destroy finally the legal unity of the spouses, . . ." How could he have done otherwise, in the face of the express reaffirmation of section 12 by the Act of 1935? How could he have held (as he was invited to do) that a man could, during marriage, start or continue proceedings against his wife for damages to compensate him for injuries suffered by him as a result of her negligence before the marriage? The courts may adapt rules they have made themselves to the changing requirements of public policy, and indeed they should.[56a] They may also adjust the interpretation of statutes to these needs. But if they started to repeal statutes in the light of what they consider to be public policy, justice, or any other "higher law," the law would be well on the way back to *Bonham's Case*,[57] and the "fundamental norm" of English law, which is the sovereignty of Parliament, would be in jeopardy.

It continues to be the law that, apart from the important exception to be discussed separately, husband and wife cannot, during marriage, incur any mutual liability in tort, and that they cannot, during marriage, start or continue proceedings against each other for a tort, whether it was committed before or during marriage. Much can be said in favour of the second of these two rules, provided it is kept in proper bounds. While they are living together, husband and wife should not be able to sue each other for assault or defamation or even for negligence. Nor, in the writer's submission, should questions of property be raised between husband and wife as matters of strict law. The rule against proceedings in tort between husband and wife operates, in so far as it applies to claims in detinue, conversion, trespass to land, ejectment, and nuisance, as a useful mitigation of the principle of separation of property.[58] Under the present law the husband does not against his wife dispose of those remedies with the help of which property is normally asserted and defended. Since in English law all judicial remedies for the defence of property are delictual, the effect of section 12 is to compel the husband to rely for the defence of his property against his wife on section 17 of the 1882 Act. According to this "in any question between husband and wife as to the title or possession of property, either party . . . may apply" to the court "and the judge . . . may make such order with respect to the property in dispute . . . as he thinks fit, . . ." If section 12 precluded proceedings in tort between the spouses altogether, it would, combined with section 17, lead to the desirable result that the rigid categories of the law of property are removed from their mutual relationship and replaced by the discretion of the judge,

[56a] As, *e.g.*, in *Ross* v. *Hughes* [1946] K.B. 517, where the argument *cessante ratione* succeeded in the Court of Appeal.

[57] (1610) 8 Rep. 114.

[58] See, *e.g.*, *Hutchinson* v. *Hutchinson* [1947] 2 All E.R. 792.

who can take into account their needs and their conduct. This, it is submitted, is a concession to the idea of the unity of the family which is entirely acceptable, and it is in fact the present law in so far as the husband's claims are concerned.[59] It would be a pity if section 17 fell a victim of any future law reform. Complaints for "personal torts" should go where they belong, *i.e.*, before courts exercising matrimonial jurisdiction which can apply the proper remedies, but not to a county court or to the Queen's Bench Division of the High Court. As regards these "personal torts" it is however arguable that the strict law of tort should apply between the spouses, once the "common establishment" has come to an end. In connection with claims based on property, the cases on the matrimonial home [60] have amply demonstrated the usefulness of the present provision which prevents a husband from suing his wife in tort even after a desertion or separation. In criminal law [61] mutual prosecutions between the spouses for larceny are precluded only while they are living together, and, after a separation or desertion, only with respect to offences committed while they still formed one household.[62] But it is suggested that actions for a tort concerning property rights should be barred even as between spouses who live apart, and that the Larceny Act should not, in this respect, be considered as a pattern for any future reform of what is now section 12 of the Act of 1882.

The trouble with the 1935 Act is not that it did not open the way towards proceedings in tort between the spouses, but that it did not abolish the common law rule against substantive liability (or, if one likes, the substantive implications of section 12 of the 1882 Act). As a result of this omission third parties continue to be affected by the rule that there can be no tort between the spouses. This observation is not by any means confined to the insurer who "stands in the shoes" of a spouse holding a third-party risk policy. Consider, for example, the position of a person who is alleged to have committed a tort against a married woman and who claims that the woman's husband was a joint tortfeasor, *e.g.*, in the event of an accident caused by the combined negligence of the husband and the third party, as a result of which the wife has suffered injuries. In *Chant* v. *Read* [63] the wife had been killed in the accident, and the question was, whether the widower was, as a joint tortfeasor, liable to contribute to the damages payable by the defendant to the plaintiff, the administrator of the wife's estate (who happened to be the husband himself,

[59] Not, however, where the issue arises in the course of an interpleader summons taken out by a third party: *De la Rue* v. *Hornu, Peron & Stockwell, Ltd.* [1936] 2 K.B. 164.

[60] *Hutchinson* v. *Hutchinson*, *supra*; *Pargeter* v. *Pargeter* [1946] 1 All E.R. 137; *Stewart* v. *Stewart* [1947] 2 All E.R. 818.

[61] Larceny Act, 1916, s. 36.

[62] Except where the property was wrongfully taken by one spouse when leaving or deserting or about to leave or to desert the other spouse.

[63] [1939] 2 K.B. 346; [1939] 2 All E.R. 286.

a point relevant *sub specie justitiae*, but irrelevant *sub specie legis*). Whether the widower was so liable depended on whether he was, "or would if sued have been, liable in respect of the same damage." [44] This, in turn, depended on (a) whether, during her life, the wife had acquired a cause of action against her husband, and (b) whether, in virtue of the Law Reform (Miscellaneous Provisions) Act, 1934, the cause of action, if any, vested in her, survived for the benefit of her estate. On the latter point no difficulty arose: if the cause of action had been acquired by the wife, it survived her death. But on the first point Hallett J. held that no cause of action had been acquired by her. The learned judge relied on section 12, tacitly assuming that that provision reiterated the common law rule against substantive liability. The case was in fact correctly decided on the same common law principle as *Phillips* v. *Barnett*.[45] The point to be noted here is the great injustice which results from the ramifications of the substantive rule against tortious liability between the spouses: why should a third party be made to suffer as a result of the chance fact that the joint tortfeasor happened to be the victim's husband? This is aggravated by the fact that the third party cannot circumvent the rule by relying on the joint tortfeasor's fault as contributory negligence. In *Drinkwater* v. *Kimber* [46] both husband and wife sued the defendant for damages for personal injuries suffered by the wife in an accident caused by the defendant's negligence. The defendant alleged that the husband was partly to blame for the accident and counterclaimed against him, asking that he should be made to contribute towards the damages the defendant would have to pay to the wife. As a result of *Chant* v. *Read* the defendant was unable to base the counterclaim on the legal principles governing contribution between joint tortfeasors. He therefore claimed that he had suffered "damage" (*viz.*, his liability to compensate the wife for her injuries) as a result partly of his own and partly of the husband's negligence and relied on the Law Reform (Contributory Negligence) Act, 1945, section 1 (which is intended to yield a weapon of defence) as a weapon of counter-attack. Devlin J. held that this was not a case of contributory negligence, and that "damage" in the 1945 Act meant physical damage, not financial loss caused by the creation of a liability to a third party. The defendant's argument was a desperate and perhaps a slightly over-ingenious attempt to defeat the "unity" rule by a diversionary campaign in the land of contributory negligence. It was doomed to failure.

Observe further how the magic of the "unity" rule enables husband and wife to appear either as one person or as two, according to their convenience and usually to the detriment of the

[44] Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6 (1) (*c*).
[45] Note 89, *supra*.
[46] [1951] 2 All E.R. 718; affirmed [1952] 1 All E.R. 701.

third party. Where the husband sues the tortfeasor for damages resulting to himself from a tort committed against the wife and where, as in *Mallett* v. *Dunn*,[67] the tortfeasor attempts to plead against the husband the contributory negligence of the wife, he is met by the doctrine of "non-identification" which the courts have laid down for cases of parent and child, of shipowner and cargo-owner, of carrier and passenger.[68] Suddenly the two are really two because the doctrine of unity does not apply in this case. Indeed, as Devlin J. said in *Drinkwater* v. *Kimber*,[69] "in this branch of the law husband and wife can both eat their cake and have it." Is it fanciful to suggest that legal "inconsistencies" are in most cases synonymous with "injustices"? Had the Act of 1935 been a bolder attempt to tackle the principle, had it been more than patchwork, the law would not only be clearer, it would also be fairer.

If section 12 of the 1882 Act were reduced to a rule of procedure, barring actions in tort between the spouses and possibly also between former spouses and their personal representatives, one of these grave injustices would be removed.[70] What is, however, much more important is the impossible situation created by the exception to the rule in section 12 to which we must now turn.

Liability in Tort: The Exception

The full wording of section 12 of the Act of 1882, in so far as it relates to the law of tort, is as follows. (This is the wording which the section has received by a consequential amendment in the Act of 1935,[71] an amendment which does not affect the points here under discussion):

"Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies . . . for the protection and security of her own property, as if she were a feme sole, but, subject as aforesaid, no husband or wife shall be entitled to sue the other for a tort."

There cannot be very many enactments as difficult to construe as this.

In the first place, it is correct to say that, in so far as they relate to remedies and proceedings against any person other than

[67] [1949] 2 K.B. 180; [1949] 1 All E.R. 973.

[68] *Oliver* v. *Birmingham and Midland Omnibus Co.* [1933] 1 K.B. 35; *The Bernina* (1888) 13 App Cas. 1; *Matthews* v. *London Street Tramways Co.* (1888) 58 L.J.Q.B. 12.

[69] At p. 715.

[70] Similarly, while s. 36 of the Larceny Act, 1916, is a rule of practical wisdom as a rule of criminal procedure, it is most undesirable that, as a result of its also being a rule of substantive criminal law, a receiver of property which in fact, though not in law, is "stolen," should go scot free: *R.* v. *Dreamer* [1919] 1 K.B. 564.

[71] First and Second Schedules.

the husband, the words "every woman . . . shall have . . . the same civil remedies for the protection and security of her own property as if she were a feme sole" are "mere surplusage."[72] It is impossible to doubt that Lush[73] is right in saying that section 1 of the 1882 Act "would have been wide enough to include proceedings by the wife for the protection and security of her separate property without the aid of the 12th section."

We can take it, then, that the practical effect of this section has always been exclusively in the sphere of the mutual relations of husband and wife. But what is that effect? What, in particular, is the meaning of the crucial words "for the protection and security of her own property" which determine the limits of a woman's right to sue her husband for a tort?

It may be useful for a moment to look at these words without any reference to the decided cases and seek to understand what they could be held to mean if they had never been construed by a court. These words envisage the fact that all delictual claims serve the protection of certain specified interests. True, for historical reasons, the English law of tort is not throughout constructed as a system of protected interests. Some torts, such as trespass, conversion, detinue, and, up to a point, defamation, are defined in terms of the interest protected against the tortfeasor which, by being so protected, becomes a right. Other torts, *e.g.*, negligence, are formulated in terms of the tortfeasor's conduct and breach of duty. Nevertheless, it is, in all cases, possible to distinguish the various interests protected by law, even if some delictual principles are so designed as to protect a multitude of interests: a claim for negligence or for breach of statutory duty may serve to defend a person's interest in his bodily integrity or his property, while, *e.g.*, a claim for conversion always protects property. Section 12, one might further argue, gives the married woman the right to avail herself against her husband of all those delictual claims which are designed to protect property, *e.g.*, trespass to land or detinue, but of others only in so far as they do so *in specie*: she can never sue for assault, but she can sue for negligent damage to her goods, though not for negligent injury to her person. She might, as MacKinnon J. held in *Ralston* v. *Ralston*,[74] sue her husband for defamation if, but only if, the libel or slander is a direct or indirect attack on her property interests. This interpretation would not make section 12 less undesirable than it is, but it would make it, to some extent, comprehensible. It would yield a rational application of the section, and would, it seems, be in accordance with the intention of the statute which,

[72] These words were used by Wynn-Parry J., delivering the judgment of the Court of Appeal in *Curtis* v *Wilcox* [1948] 2 K.B. 474; [1948] 2 All E R. 574, 576, but they were used with reference to the words "except as aforesaid, etc." to which, with respect, they should not be applied

[73] p. 581.

[74] [1930] 2 K.B. 238.

having made all property belonging to married women "separate property," went on to give them the remedy to defend it.

An action in tort, it has been submitted, is always brought for the protection of some interest which the law deems worthy of such protection. An action in tort, it is further submitted, is not brought for the protection of the right of action. If X sues Y for conversion, he protects his property, not his right to sue for conversion. If he sues him for libel, he protects his reputation, not his right to sue for libel. If I put on a raincoat, I protect my body against the rain, not the coat. This seems obvious, but it is put forward with some diffidence because of the decision in *Curtis* v. *Wilcox*.[75] In that case the Court of Appeal held, that since a woman's right of action in tort was a "thing in action" and therefore "property" according to section 24 of the 1882 Act, an action by a wife against her husband for damages for pain and suffering caused to her by his pre-nuptial negligence, was brought "for the protection and security of her own property," *viz.*, of her right of action.

This interpretation of the section had, as it were, been inherited by the Court of Appeal from the decision of McCardie J. in *Gottliffe* v. *Edelston*,[76] which the Court of Appeal overruled. The situation confronting McCardie J. was that a young man, driving a car, negligently caused an accident, apparently because he paid too much attention to the young woman who was his passenger and too little to other vehicles and to horses on the road. The young woman suffered serious injuries. Shortly afterwards they became engaged. This did not prevent the writ from being issued or the statement of claim from being delivered. The next step in the proceedings was the marriage, and after that came the delivery of the defence, which, many months later, was amended so as to plead that, as a result of the marriage, the action could not now be proceeded with. McCardie J. dismissed the action on this ground, *i.e.*, by reason of section 12 of the 1882 Act. It had been urged by counsel for the plaintiff that her right of action for negligence was an action for the protection and security of her property, on the ground that the right of action was a chose in action and hence "property" according to section 24 of the Act. The learned judge refused to act on this submission, rightly, it is suggested, but not for the right reasons. He held that the claim in tort was not, for the purposes of the Act, a chose in action,[77] but he did not say that, whether it was or not, the present action was not brought for its protection. He saw that if he acted as counsel for the plaintiff desired him to act, "the consequences would be striking. It would mean that although no husband can sue his wife for any tort whatsoever committed by her against him, whether before or during

[75] [1948] 2 K.B. 474; [1948] 2 All E.R. 574.
[76] [1930] 2 K.B. 378.
[77] At p. 391.

marriage, yet the wife can sue the husband for every tortious wrong against her before marriage, whether it be for negligence, libel, slander or assault." [78] This would indeed have been the consequence of a decision in the plaintiff's favour.

The facts in *Curtis* v. *Wilcox* were almost identical with those in *Gottliffe* v. *Edelston*. Again the sequence of events was: an accident caused by the negligence of the defendant, and resulting in injuries to the plaintiff, the issue of the writ, the marriage between the defendant (husband) and the plaintiff (wife), and then the trial of the action. The court overruled *Gottliffe* v. *Edelston* on the point that a delictual claim was a chose in action and hence property, but it did not even question the hypothetical conclusion drawn by McCardie J. that, if it was, the action for negligence would have been brought for its protection. On the contrary Wynn-Parry J., who delivered the judgment of the court, pointed out that, under the Act, the "right of action became part of her separate estate on her marriage" and that "she could reduce" it "into possession by action after marriage, such action being pursued for the purpose of securing that part of her separate estate." [79] "Under section 12 the right of suing which is given to a married woman extends, so far as concerns what may be the subject-matter of her action, to all her property." But, "the common law rule which otherwise" (*i.e.*, apart from the section) "still applies . . . would prevent a married woman from pursuing a purely personal claim against her husband, *e.g.*, for damages for libel or slander or assault." [80] These last words were, of course, *obiter*. It is not clear whether they were intended to refer to post-nuptial or to pre-nuptial torts. If they were meant to limit the effect of the decision as regards pre-nuptial torts, it is not clear why what applies to general damages for pain and suffering by reason of negligence should not also apply to defamation or assault, *i.e.*, in what sense these torts are more "purely personal" than negligence resulting in personal injury.[81] In the writer's submission, the decision of McCardie J. should not have been overruled, but the court should have disapproved of McCardie J.'s reasoning. It is respectfully submitted that the Court of Appeal was right in holding that a claim in tort is a chose in action. Nevertheless, in its result, the decision of McCardie J. would seem to have been correct because it is a fallacy to say that an action in tort is brought for the protection of the right of action.

If there is any merit in the point here submitted, it follows that *Curtis* v. *Wilcox* was wrongly decided because it rests on a fallacious reasoning in that it confounds the thing which protects with the thing which is protected. This might not be a decisive

[78] At pp. 390 *et seq.*
[79] [1948] 2 All E.R. at p. 574.
[80] *Ibid.*, at p. 576.
[81] See *per* McNair J. in *Baylis* v. *Blackwell* [1952] 1 All E.R. at p. 77.

argument against the judgment if it promoted substantial justice between the spouses. It is, however, also submitted that it has extended a palpable injustice which is inherent in section 12.

A comparison between *Curtis* v. *Wilcox* and *Baylis* v. *Blackwell*[83] shows that a married woman may, during marriage, recover damages from her husband for injuries suffered by her before marriage as a passenger in a car negligently driven by him, but that, in the reverse situation, *i.e.*, where she was the driver and he the passenger and the victim of the accident, the claim is precluded by section 12. This illustrates the most characteristic and the truly amazing feature of section 12, which is the rule of inequality it embodies. The tendency of all legislation on the relation between husband and wife has, ever since its first feeble beginnings in the Matrimonial Causes Act, 1857,[84] been in the direction of the equality of the sexes. Its aim has been to remove the inequalities which were imposed upon married women by the common law, and also by equity in the shape of the restraint on anticipation and alienation.[85] As regards the property relation between the spouses, the rule of equality is, in the present law, expressed not only in the Act of 1935, but also in the Administration of Estates Act, 1925, which deals with intestacy,[86] in the Larceny Act, 1916, which regulates the law of larceny as between husband and wife without discriminating between them, and in section 17 of the 1882 Act which makes it possible for the husband as well as the wife to invoke the discretion of the court in their mutual property relationship. Section 12, however, enacts a rule of inequality. What it says is, in effect, that the remedy provided by section 17 is the only and exclusive remedy a husband has against his wife with regard to his property, but that for the wife it is optional and that she may choose between relying on the discretion of the court and relying on the strict letter of the law. The husband who wishes to recover the matrimonial home from his wife in a case of separation or desertion must rely on section 17, a very beneficent rule indeed,[87] but the wife can evict the husband from the matrimonial home as a matter of right, if it is her property and if the matrimonial consortium has come to an end.[87] She can sue him for the return of movable property detained by him,[88] but he cannot even by a *quia timet* injunction prevent her from committing a tort against his property interests.[89]

[83] [1952] 1 All E.R. 74.
[84] ss 21 and 26.
[85] Married Women (Restraint upon Anticipation) Act, 1949.
[86] s. 46.
[87] See cases quoted *supra*, note 60.
[87] *Shipman* v. *Shipman* [1924] 2 Ch 140; *Boyt* v. *Boyt* [1948] 2 All E R. 486. Here the court did have a discretion, but only on the ground that the remedy sought by the wife was an interim injunction.
[88] *Larner* v. *Larner* [1905] 2 K B. 599.
[89] *Webster* v. *Webster* [1916] 1 K.B 714.

Whether this violent swing of the pendulum from inequalities imposed upon the wife to inequalities imposed upon the husband was due to an oversight[90] or to an exuberance of feminism, need not and probably cannot now be determined. Nor does it matter very much: if it was true in the Victorian age that the female was in need of protection against her husband in circumstances in which he could be expected to look after his interests, it was certainly no longer true in the world of 1935. It was not as if the attention of the legal world had not been drawn to this injustice: it was castigated in detail in a monumental and masterly judgment[91] and also adverted to in the leading textbook,[92] quite apart from the mild and implied strictures administered by the Law Revision Committee.[93] Nevertheless it was perpetuated by the Act of 1935, and by the decision of the Court of Appeal in *Curtis* v. *Wilcox* its scope was very considerably enlarged.

How far has it been enlarged? How much remains today of the rule that a wife is not entitled to sue her husband for a tort? It was suggested above that *Curtis* v. *Wilcox* has eliminated the rule as regards all pre-nuptial torts alleged to have been committed by the husband against his wife. Any claim for a tort is a chose in action and therefore "property." Any action brought for the enforcement of that claim is said to be brought for its protection and security. One cannot avoid the conclusion that, on this reasoning, the wife may commence or continue any action against her husband based on a tort committed before marriage, whatever the nature of the tort. The Court of Appeal has in fact rewritten section 12. The rule has now been made to read: "No husband shall be entitled to sue his wife for a tort, and no wife shall be entitled to sue her husband for a tort committed after their marriage, except for the protection and security of her own property."

Curtis v. *Wilcox* refers to pre-nuptial torts only. It is based on the doctrine that, at the time of the marriage, a delictual claim vested in the wife and that that claim was the property she protected by her action. If the tort is committed during the marriage, the substantive common law rule against tort liability between husband and wife prevents the wife from acquiring a delictual claim. Hence it cannot, in that case, be said that by suing she seeks to protect or to secure an existing chose in action. It is only if the tort was an attack on her property (other than the tort claim itself) that she can sue the husband, as, *e.g.*, in cases of detinue, conversion, or trespass to land. Unless this is the proper interpretation of *Curtis* v. *Wilcox*, the decision has the more far-reaching effect, undoubtedly not intended by the Court of Appeal, that a

[90] Suggested by *Lush*, p. 588.
[91] *Gottliffe* v *Edelston*, *supra*.
[92] *Lush*, pp 588 *et seq*.
[93] *Supra*, p. 144.

wife has an unrestricted right to sue her husband for all torts committed during marriage.

The seemingly academic distinction between the substantive rule of the common law that husband and wife cannot commit torts against each other, and the procedural rule that they cannot sue each other for a tort, has thus become a matter of practical importance. Had the Act of 1882 abolished the common law rule against tort liability between husband and wife arising during marriage, had it merely enacted that they may not start or continue court proceedings against each other (except where she seeks to protect and secure her property), then, on the reasoning of *Curtis* v. *Wilcox*, there would have been no limit whatever to the wife's right to sue the husband for a tort. *Curtis* v. *Wilcox* lays down that, in view of the wife's right to sue for the protection of her property, there is no procedural obstacle to her action at all. All that prevents her from suing her husband for post-nuptial torts is the survival of the "unity" rule in its substantive aspect.

This substantive rule not only survived the 1882 Act, but was, as pointed out above, implicitly reiterated in section 12. The words "no husband or wife shall be entitled to sue the other for a tort" must be read as meaning "no husband or wife shall be entitled to claim against the other or to sue the other for a tort." That this is the correct reading of the section can hardly be doubted. If the rule merely barred proceedings and if it did not also bar substantive liability, then the exception too would have to be considered as merely procedural. It is, however, obvious, and the courts have, in any event since *Larner* v. *Larner*, held that the exception confers on the married woman a substantive right to obtain damages or an injunction against her husband for torts committed during the marriage. The exception being substantive, so is the rule.

All this is almost unbelievably and quite unnecessarily involved, and *Curtis* v. *Wilcox* has not made it any easier. As long as the House of Lords has not overruled it, the decision represents the law, whatever objections may be levelled against it. Fundamentally it is the legislature and not the court which is to be blamed for the present labyrinthine state of the law. It is time that the work begun in 1935 should be completed, and that the whole question of the mutual liability between the spouses should be re-examined and be regulated by statute. If and when this is done, the archaic and artificial remnants of the legal "unity" rule should be removed together with the anomalous inequality between the spouses which is laid down in section 12. Yet care should be taken not to destroy those principles and provisions which seek to give effect to the unity of the household which is a fact and not a fiction.

O. Kahn-Freund.[*]

[*] Professor of Law in the University of London.

THE HABITUAL PRISONER

THE Criminal is no longer regarded as a single social species and the study of his natural history—dating back to the time of Lombroso—is now seen to involve the investigation of a wide variety of human types, whose one common characteristic is that they have been convicted of breaking the law (even this single classification gets complicated as we look closer—the boy who rode his bicycle on the foot-path and was fined half a crown in the juvenile court hardly qualifies as a criminal—yet when we search for the boundary line of law-breaking serious enough to rank as crime we may find ourselves entangled in some such description as "finger-printable offences"). The fortress-like wall round a gaol, or the imaginary line marking the bounds of a prison camp tie up strange bunches of human beings; the pacifist whose convictions reject all form of conscription may walk at exercise with a reprieved murderer, the half-witted anaemic mother whose incompetent neglect of her children has amounted to cruelty may shoulder the woman of strong maternal feelings, but slender civic conscience, who has nourished hers on the coupons of half a dozen stolen ration books.

No one investigation can cover these varied characters. When we begin to consider the weaknesses which have led to their offences the clues carry us far back outside the gaol and we find each group of prisoners is linked to a class of free citizens with the same vulnerability—crime is not disease, but the analogies between them are often illuminating. If you look for the causes of malady amongst the patients of a prison hospital you are forced to consider the origins of cancer, of tuberculosis, or rheumatism in the population as a whole. Violence, jealousy, a reckless desire for adventure or a luxurious life are certainly not peculiar to Her Majesty's guests. They bring misery with them wherever they exist, but in some cases, their damaging effect is not of the kind with which the law can deal. For the purposes of research into their origins and nature the distinction between the anti-social behaviour which qualifies as "crime" and that which remains unpunished is of little importance.

But 200 years ago an inquiring man of science would have found one disease appearing mainly amongst prisoners—the gaol fever which was itself a result of incarceration. And today, as Dr. Norval Morris shows in his recent book,[1] there is a class of men and women (very few of the latter) conditioned by prison to prison, by crime to crime, till the first varied origins of their fight with society are almost lost in the uniformity of their present

[1] *The Habitual Criminal*, by Norval Morris.

behaviour. The habitual criminal can only be studied in the prison which is, in fact, almost his natural habitat. For many of them the author found that "extra mural life had become too much of a strain and that prison is the only life to which they have been trained and in which they find security. Consciously or unconsciously they desire it."

This selection of the subjects of his study differentiates Dr. Morris's book rather sharply from most modern inquiries into crime. All his cases were men of over 30: to trace out in detail the experiences of their early years or their probable inheritance would be impossible. It is, in a way, the haphazard system under which they were sentenced, the penal system itself, which is under inquiry, rather than the factors which originally brought them under its scope.

> The Criminal Court, then, achieves greater success as a fact-finding and law-applying agency than as a sentence-inflicting body. Its excellence in the former function springs largely from its unemotional, painstaking and objective approach; and it is submitted, its relative failure in choosing appropriate punishments arises from its emotional, expeditious and subjective reaction to the established offence and the convicted criminal. Until the unemotional, painstaking and objective approach is extended from the proof of the crime to the analysis of the criminal there will be no rational, functioning sentencing policy.

In this book exactly such an approach is made. The selection of cases bears the mark of a moment of transition in our penal system. It is common knowledge that the old form of preventive detention, a separate sentence following one of penal servitude (after a finding of guilt as an habitual criminal), was but little used. In October, 1948, at the time when this form of sentence was just being abolished by the Criminal Justice Act, the total number of men undergoing preventive detention was 82. All of them were interviewed by Dr. Morris, who collected from them and from their records a number of details throwing light on their past lives and on the effect—or non-effect—of their many sojourns in prison. His cases included a further 270 confirmed recidivists serving sentences in Wandsworth Prison, each of whom would under the 1948 Criminal Justice Act be liable to preventive detention under the new form as an immediate penalty. These men were studied for the most part in their records only. One of the challenging questions emerging from the inquiry is as to the reasons why the histories of this latter group show much more serious offences than those of the preventive detainees. Not that the detainees had not a heavy record of anti-social acts. Altogether over 8,000 offences are admitted to their discredit; they had been actually convicted of 1,085. Of these offences only seven could be construed as against the person, one wounding, two assaults, three of a sexual nature

and one cruelty to children. They were rather an abject little band; unemployed and mostly unemployable, unwanted and unsound. Indeed as a group they were "physically pitiable, being far less healthy than a group of similar age distribution taken from the general population." None of them was happily married or had any sort of home when out of prison. Not one of them had a decent record of work since 1930. Unfortunately no psychiatric research or mental tests were available but they are described as "far below standard mentality, and disturbed emotionally—though whether this has been a cause of their criminality or whether their lengthy prison sentences have been a cause of their many neuroses cannot be answered for the group; normally each had reacted unhappily on the other." But perhaps some sense of superiority is necessary to the maintenance of life—with one exception, the detainees showed a profound horror of the workhouse and contempt for its inmates whilst having no shame about prison.

Such was the catch of the old preventive detention net: "generally harmless and elderly men whose sole aim is to lead a quiet life" in the words of a Commissioners' Report. Will the much larger haul already being made by the new legislation resemble them? This is the question which we must needs ask in reading the second part of Dr. Morris's investigations into the 270 Wandsworth prisoners who would have been qualified for a sentence under the present law.

They were on the average younger men, the total of their offences, proved or "taken into account" reached 12,880 and on the whole these were more serious than those of the detainees, a much larger ratio being crimes against the person, whilst many of the crimes against property were of a very grave type. Their general health, though of an appreciably lower standard than that of the general population, was better than that of the detainees, as might be expected from their lower average age (41½ as against 50¾). Again, no mental tests were available, nor does there appear to have been any extensive psychiatric inquiry into their mental states. Seven had been at some time certified as insane, nine were border-line mental defectives, 40 could be classed as belonging to the "non-sane, non-insane" group, some being aggressive psychopaths. The group contained some men not completely deprived of normal home life, 57 lived with their wives (legal or *de facto*) when out of prison; but 88 bachelors and 21 divorced men and 10 widowers is a very high percentage of lone men out of 270: 195 were unemployed when they committed their last crime, and as a group their employment records were bad, though not as bad as those of the detainees (a result probably of better health and comparative youth). Such were the men of whom many are probably now serving sentences of preventive detention. Unfortunately one cannot form any high hopes of its curative effect, though mere old age has a tendency to promote respectability.

The recidivist is, by definition as it were, not an easily reformable person—preventive detention—old style—showed far more reconvictions than successes amongst those who were discharged. Amongst the two groups of recidivists studied by Dr. Morris an elaborate investigation showed that "the length of each period of penal confinement had no effect on the subsequent interval between discharge and reconviction." Finally of the eleven members of the group who had undergone corporal punishment all but two (who were punished for prison offences) again committed crimes of violence. The prognosis is emphatically not good. These are the failures of our society, whether by birth, by breeding or by punishment; it must be protected against them, but where deterrence by suffering or wretchedness has proved repeatedly futile, where punishment has completely failed, segregation should not be aggravated by useless penalties.

Most readers of Dr. Morris's book will probably first turn to this study of actual prison populations. But he has also given us a most valuable résumé of comparative legislation and practice with regard to habitual criminals in some other countries, with special emphasis upon the non-Asiatic British Dominions. Since within the Commonwealth New South Wales was the first country to introduce special legislation for dealing with recidivists the experience of this and the other Australian states is of particular value. The New South Wales provision that a person cannot be qualified as an habitual criminal unless his crimes include at least one serious offence against the person might well be more widely imitated; no other state has followed this example, though in several of them crimes of violence carry special weight in this connection. A study of this part of the book brings home vividly the paradox that, whilst some segregation of persistently anti-social characters has been considered needful for the safety of the public in almost every modern community, the measures devised for such segregation may become a greater threat to its well-being than the criminality they set out to repress.

Under Hitler's régime, in the five years from 1934 onwards, 7,657 persons were imprisoned under legislation dealing with recidivists. In 1933 the Minister of Justice exhorted the courts to make freer use of the sentence; in 1941 the decision as to release was given to an official in his ministry and the "protection of the community or the requirements of a just punishment" were made legal justification for death sentences on habitual criminals. The "savage and extensive use of the comprehensive habitual criminal legislation" by the courts of Italy under Mussolini was hardly less menacing. The habitual offender seems a milder evil than the potential oppression of such laws against him!

Even today in the Union of South Africa a considerable number of persons, the great majority of them non-European, serve indeterminate sentences for a third, or later conviction for any of

a list of offences ranging from rape and attempted murder down to theft of any kind. In 1946 their number was 1,886. Their régime differs little from that of other prisoners "unless indeed it be that the treatment accorded to habitual criminals is more disagreeable."

No doubt it is the possibility of such abuse that has moved legislators in most democratic countries to hedge round this form of sentence with rather exacting conditions. Dr. Morris discusses the different philosophies which underlie the systems of legislation dealing with habitual offenders and poses a number of pertinent questions. Is the sentence of preventive detention to be punitive in its aim, or should it be purely a measure of social security enforced with a minimum of discomfort to the segregated person? If the latter, should the "double-track" system of a punitive sentence for the present crime, followed by mere detention justified by previous crimes already "purged," be adopted (as in the former English system); or should the "one-track" system allow a change from an ordinary prison sentence at its beginning into a milder treatment at its close—as the regulations under the 1948 Criminal Justice Act seem to imply? Or can some better method than either be devised?

Does the transition from incarceration to even a supervised liberty put too heavy a strain on the man who has spent many years in prison? How could this be remedied? Should the sentence imposed by the court be indeterminate without maximum or minimum limits, its length dependent wholly on administrative decision, or should it be indefinite between limits? What should be the criteria for release? Can prediction tables be worked out, on the American model, to lessen the risks of prematurely opening the prison doors or of keeping them needlessly shut?

These questions are made more urgent by the greatly increased use of preventive detention in this country today: anyone to whom they appeal, whether from the legal or the penological point of view, will find Dr. Morris's book full of interest. We can only hope that he will follow it with further researches into allied questions carried out with the same scrupulous exactitude and sincere humanity.

MARGERY FRY.[1]

[1] J.P., M.A., LL.D.(hon.), D.C.L.(hon.); formerly Principal of Somerville College, Oxford, Governor of the B.B.C., and Hon. Secretary of the Howard League for Penal Reform.

CHATTELS AND CERTIFICATES IN THE LAW OF NEGLIGENCE

It has often been pointed out that the implications of the two great House of Lords cases in our modern law of tort are conflicting, and that when an English court is faced with facts which fall within the area of their contact, it will find great difficulty in coming to a decision which squares with them both. Such was the position of the Court of Appeal in *Candler* v. *Crane, Christmas & Co.*[1] last year. The "Neighbour" doctrine of Lord Atkin, supported as it was by the majority in the House of Lords in *Donoghue* v. *Stevenson*,[2] can and has been taken as justification for extending the range of liability in negligence, so that it has at last been invoked to support an action by a plaintiff who suffered financial loss through a public accountant's negligent misstatement. On the other hand, there is implicit in the language of the Lords of Appeal in *Derry* v. *Peek*[3] the proposition that misstatement lies properly in the realm of deceit and that persons who rely upon statements in business transactions should be protected from dishonesty but not from mere carelessness. One might repeat the words of Professor Paton: "After all, why should we treat the implication of *Derry* v. *Peek*[3] with greater reverence than the implication of *Donoghue* v. *Stevenson*[2]"?[4] It is difficult to see in what way the earlier case is of greater authority than the later, especially in view of section 8 of the Directors Liability Act, 1890, (now substantially re-enacted in section 48 of the Companies Act, 1948), which imposes liability on persons issuing a company prospectus in which false statements are made and reasonable care is not shown. The ground of the actual decision in *Derry* v. *Peek*[3] is thus removed. However, the arguments for and against the relegation of *Derry* v. *Peek* to the position of leading case on the internal content and not on the external range of a deceit action are lucidly and comprehensively laid out in such recent valuable articles as those of Professor Paton,[5] Mr. Justice Fullagar of the High Court of Australia,[6] and Dr. W. L. Morison,[7] and indeed in the judgments of the Court of Appeal in *Candler* v. *Crane, Christmas & Co.*[1] itself.

It is proposed here to carry the discussion one stage farther, and, assuming that the need for some limited principle of liability

[1] [1951] 2 K.B. 164.
[2] [1932] A.C. 562.
[3] (1888) 14 A.C. 337.
[4] (1951) 25 Austr.L.J. 292.
[5] "Liability in Tort for Negligent Misstatements," (1947) 25 Can.B.R. 123.
[6] "Liability for Representations at Common Law," (1951) 25 Austr.L.J. 278.
[7] "Liability in Negligence for False Statements," (1951) 67 L.Q.R. 212.

is admitted, to suggest the types of limitation that could be placed upon that liability, the practical problems that would arise from their application, and some difficulties of theoretical classification in a general scheme of tortious liability which would result. It will be assumed that it is open to the House of Lords to admit such a limited principle as that suggested by Denning L.J., in *Candler's Case*,[8] and that there is a social need for the protection of persons in the position of the plaintiffs in such cases as *De La Bere* v. *Pearson*,[9] *Le Lievre* v. *Gould*,[10] *Cann* v. *Willson*,[11] *Candler's Case* [12] and some of the American and Commonwealth cases. Professor Seavey has recently made an eloquent plea for this.[13] In the discussion that followed the decision by the New York Court of Appeals *against* liability in *Ultramares Corporation* v. *Touche*,[13] one American professional journal [14] actually urged the reversal of the decision, arguing that it is the claim of the accounting profession that its prepared statements be relied upon, and that it does not lie in its mouth to deny the duty of care it so insistently claims to perform. It is also an inference from the many attempts to attain the same result by different roads. Decisions which in their result support a principle of liability for negligent misstatement by professional men and public officials have been explained as going on implied agency [15] or third party benefit. *Glanzer* v. *Shepard* [16] is sometimes treated as going on the latter principle and the principles of the two types of liability are analogous, though not co-terminous. In any event, such a loop-hole is not available in this country, unless Denning L.J.'s remarks in *Smith* v. *River Douglas Catchment Board* [17] represent a possible development of English law on this subject. In American jurisdictions the definition of fraud is wide enough to cover many cases which in England

[8] [1951] 2 K.B. 164, at pp. 179 *et seq.*
[9] [1908] 1 K.B. 280.
[10] [1893] 1 Q.B. 491.
[11] (1888) 39 Ch.D. 39.
[12] "*Candler* v *Crane, Christmas & Co.*: Negligent Misrepresentation by Accountants" (1951) 67 L.Q.R. 466. And *cf.* Fullagar J. *op. cit.* 282: "One must, I think, feel most reluctant to believe that under a developed system of law, a person in the position of the plaintiff in *Cann* v. *Willson* had no redress." A note in 65 Harvard L.R. 856 indicates that *Candler's Case* would have gone the other way, at any rate in New York.
[13] (1931) 255 N.Y. 170 (see pp. 175–76, *infra*).
[14] *The Certified Public Accountant*, Vol. 10, 228 (American). Compare (1951) 65 Harvard L.R. 856: "Imposition of this extensive duty of care could also be justified by the fact that third persons are virtually forced to rely on the representations of an accountant, because of the difficulty of checking the work independently. Moreover, the accountant's fee could properly reflect the severe risk to which he would thus be subjected, since it is the client who benefits directly from the wide circulation that can be given to an unqualified report."
[15] Thus *Humphrys* v. *Pratt* (1831) 5 Bli. (N.S.) 154 (where the House of Lords held for a sheriff who had lost damages in an action in trespass for taking A's goods when B, against whom a *fi. fa.* writ had been obtained and delivered to the sheriff, falsely represented they were B's own) was explained on this ground by Tindal C.J. in *Collins* v. *Evans* (1844) 5 Q.B. 820.
[16] (1922) 233 N.Y. 236 (see p. 173, *infra*).
[17] [1949] 2 K.B. 500, at pp. 514 *et seq.*

would not fulfil the stringent requirements of *Derry* v. *Peek*.[3] Thus the *Touche Case*[13] itself was sent back for retrial on the ground of there being evidence of deceit. *De La Bere* v. *Pearson*[9] is an example of a case of this kind succeeding as breach of contract, although the consideration of the contract was, to say the least, tenuous.[18] Williston[19] made as his chief argument against any liability in negligence for misstatement the fact that misrepresentation and negligence have proceeded along totally different lines in the common law. "There is a violation of historical continuity in forcing the two together."[20] Now there is no doubt that many possible situations are covered by the fact that negligence is redressible if within a contract. But the loss is the same and the plaintiff is not the less injured because there is no contract: what logic demands the limitation of liability to cases of contractual relationship and of actual dishonesty merely because the need for a further remedy came after the forms of action were fixed? Finally, many cases are of professional negligence; it seems well accepted that a doctor who writes a careless prescription is just as liable as if he performed a careless operation. But the categories of common callings are very limited and do not include the important professions of valuation and accountancy. As Professor Paton remarks: "It seems rather absurd that an independent duty of care in tort should be recognised only in those callings which were regarded as important in the formative period of the common law."[21]

It is hoped that enough has been said to show that there is a strong case for the law meeting a new social need which has only made itself felt in comparatively recent times, and that the existing remedies are inadequate. It is submitted that the claim for open recognition of some principle of liability in its own right, albeit a limited one, is sufficiently strong to warrant an examination of the possible ways in which it might be worked out.

One further preliminary point must be made. It seems probable that where the injury is physical, liability in negligence does not depend on it being caused by defendant's positive act and not his mere statement:[22] The argument that it is representation and not physical act which is the cause of the injury in such cases as *Donoghue* v. *Stevenson*[2] and *Watson* v. *Buckley*[23] is too well-known to merit discussion here.[24] But the proposition is a legitimate inference from more obvious cases such as *The Apollo*[25] (where admittedly the representor was in the public capacity of harbour-

[18] See the note in 28 L.Q.R. 138, and Dr. Morison in 67 L.Q.R. 217.
[19] (1911) 24 Harvard L.R. 415.
[20] *ibid.*, 436.
[21] 25 Can.B.R. 180.
[22] See, *e.g.*, Professor Lawson, *Negligence in the Civil Law* (1950), 34–6.
[23] [1940] 1 All E.R. 174.
[24] See, *e.g.*, Winfield, *Tort*, 5th ed., 1950, 392.
[25] [1891] A.C. 499. *Beven on Negligence*, 4th ed., Vol. 2, 1427.

master) and *Sharp* v. *Avery* [26] where the negligent representation that he knew the way was the only link between defendant's mistake in going off the road and plaintiff's injury on the following motor-bicycle.[27] But in any event, the important types of liability for negligent misrepresentation for which there is a social necessity will be almost entirely for financial loss, for loss of money in reliance upon the reports of accountants and surveyors. Roman law systems have less difficulty in treating physical and economic loss in the same way, although in practice the defences of contributory negligence and remoteness of damage (to use English terminology) may more easily succeed.[28] But the English courts are chary of allowing a general liability in negligence for financial loss. There is no hesitation in redressing it where the cause of action is deceit or conversion, but that a man should be saved from a bad bargain because of another's carelessness where he has not taken care to tie him down by contract is somehow abhorrent to the common law mind, at any rate in England. Where there is a contractual link, even though it has to be supplemented by a delictual link between the negligent party and the other contracting party, that has been sufficient to allow a claim for damages in negligence for purely economic loss: *Morrison* v. *Greystoke Castle*.[29] But it is difficult not to agree with Denning L.J. when he says: "I can understand that in some cases of financial loss there may not be a sufficiently proximate relationship to give rise to a duty of care, but if once the duty exists, I cannot think that liability depends on the nature of the damage." [30] Charlesworth's suggestion [31] that the mechanics of causation are more difficult to assess in such cases is not the real gravamen of the charge against pecuniary damage liability. The true difficulty lies in the *Re Polemis* [32] rule, the full injustice of which has not become apparent owing to the infrequency of its invocation in the courts. But once a duty is established under such a principle as will presently be argued, there will be liability for all direct damage. In the *Touche* [13] type of case this may amount to millions. However, the limitations suggested below would restrict the incidence of the *Re Polemis* rule, and the defences of contributory negligence and remoteness of damage are available, although the spreading of damage to another

[26] [1938] 4 All E.R. 85. The case is similar to Fullagar J.'s hypothetical case of the motorist asking the way, being mistakenly directed and wrecking his car in a deep hole in the road. Perhaps this could go off on remoteness of damage, or contributory negligence. See 25 Austr.L.J. 288.

[27] Dr. Morison (67 L.Q.R. 218–21) also suggests that a negligent misstatement may make plaintiff an invitee and thus impose occupier's liability, citing *Mountney* v. *Smith* (1904) C.L.R. 146.

[28] Such is, *inter alia*, the thesis of Professor Price in a series of articles in (1950) 67 S.Afr.L.J. 138, 257 and 411; (1951) 68 S Afr.L.J. 78.

[29] [1947] A.C. 265.

[30] [1951] 2 K.B. 164 at 179.

[31] *The Law of Negligence*, 2nd ed., 1947, 16, cited [1951] 2 K.B. at 202.

[32] [1921] 3 K.B. 560.

interest than that originally invaded (if that be the true explanation of the *Liesbosch Case* [33]) would appear difficult to apply here. If in the result the Contributory Negligence Act cannot be invoked, and the damage is heavy, then defendant should not be morally excusable. Professor Price of the University of Cape Town, discussing the suggestion that there was liability in *Glanzer* v. *Shepard* [15] but not in the *Touche Case* [13] (both New York cases) because the harm was greater in the latter, says: "Frankly, the suggestion is preposterous. It asserts that 'the greater the possibility of harm, the less the liability.'" [34] And in the last resort the duty may be denied: such a practice is not unknown in the civil as well as the criminal law. Cardozo J. in the *Touche Case* [13] mentioned the fact that in the *Glanzer* v. *Shepard* [15] situation the value of the article in question was known or ascertainable, and the loss was insurable. This would apply to all cases. Lloyd's of London have a policy for accountants; the effect of such a liability if accepted would be a slight increase in accountancy fees, but also a corresponding tightening of the already high professional standards, more valuable reports and greater security for prospective shareholders and mortgagees. It is doubtful, if the limited scope of the doctrine is recognised, that business would take the gloomy turn predicted by Cardozo J. However, this inhibition is undoubtedly at the root of judicial conservatism in this matter, and it is for this reason that the limitations have to be introduced.[35] Comfort may be gleaned from Professor Paton's remark that tort is less amenable to arguments of abstract logic than any other branch of the common law, "because tort is, I think, the feminine section. It is not logical but rather wayward and exciting." [36] The possible practical limitations will be investigated first, therefore, before discussion of their juristic basis. For convenience of discussion the framework adopted by Denning L.J. in *Candler's Case* [1] will be followed.

(1) *By Whom Should A Duty Be Owed?*

Denning L.J. in his judgment in *Candler's Case* [1] suggested that liability be confined to "those persons, such as accountants, surveyors, valuers and analysts, whose profession and occupation it is to examine books, accounts and other things, and to make reports on which other people—other than their clients—rely in the ordinary course of business." [37] The same type of limitation

[33] [1938] A.C. 449.

[34] (1951) 68 S.Afr.L.J. 88.

[35] Thus Prosser, *Torts* (1941), 733, describes the attitude of the American courts: "It is only where intangible economic interests are invaded that they have become alarmed at the possibility of liability of unknown and virtually unlimited extent, and have developed a more restricted rule. This has taken the form of limitation of the group of persons to whom the defendant may be liable short of the foreseeability of possible harm."

[36] (1951) 25 Austr.L.J. 293.

[37] [1951] 2 K.B. 164 at 179.

is contained in section 552 [38] of the Restatement of the Law of Tort of the American Law Institute, which is so clearly phrased and will be referred to so often in this paper, that it is proposed, at the risk of repetition, to cite it once and for all in full.

"One who in the course of his business or profession supplies information for the guidance of others in their business transactions is subject to liability for harm caused to them by their reliance upon the information if

"(a) he fails to exercise that care and competence in obtaining and communicating the information which its recipient is justified in expecting, and

"(b) the harm is suffered

(i) by the person or one of the class of persons for whose guidance the information was supplied, and

(ii) because of his justifiable reliance upon it in a transaction in which it was intended to influence his conduct or in a transaction substantially identical therewith."

Thus Dr. Goodhart, in his note on *Candler's Case*,[1] refers to Lord Haldane's speech in *Nocton* v. *Ashburton* [39] and continues: "It is therefore open to the House of Lords to hold that such a special duty of care exists where the statement is made by a *professional man* [40] who knows that third persons will rely on his statement." [41] Dr. McKerron also suggests that *Candler's Case* might be reversed "on the ground that persons in the position of accountants who practise a *public or quasi-public calling* [40] owe a more extensive duty of care in regard to statements or certificates which they make or prepare in the exercise of their calling than ordinary persons." [42] One learned writer asks: "And why should this new load be fastened on the backs of professional men only and not on those of business men too?" [43] The reason surely lies in two facts. In the first place there is no general liability in English law for negligent misstatements, nor is such a liability urged by anyone. If there were, almost any idle remark in conversation would constitute a prima facie case of negligence. On the other hand, there is genuine hardship if persons advance money on the faith of certificates having all the appearance of authenticity and prepared by specialists who serve the public, and lose it

[38] s 810 imposes general liability where defendant *knew* either that the statement was false, or that he did not have the knowledge he professed, while s. 811 imposes liability for failure to take reasonable care in making the statement upon a limited class: "one a part of whose business or profession it is to give information upon which the bodily security of others depends." These two sections refer only to *bodily* harm.

[39] [1914] A.C. 932 at 947, etc.

[40] My italics.

[41] (1951) 67 L.Q.R. 177.

[42] (1951) 68 S.Afr.L.J. 322.

[43] Mr. K. W. B. Middleton in (1951) 68 J.B. 182.

through the specialists' carelessness. It is for that reason that a duty-situation should be created for these professional men. It may be that the courts will find themselves justified in extending the class slightly: *Donoghue* v. *Stevenson* [3] itself has spread to repairers and controllers of dangerous chattels. The categories of "professional men" may remain to be filled as the course of litigation and public policy demand.[44] Thus it may be considered that company promoters and directors are not professional men, and *Derry* v. *Peek* [3] itself may stand on that ground. But the surveyor in *Le Lievre* v. *Gould*,[10] the valuer in *Cann* v. *Willson* [11] and the accountant in *Candler's Case* [1] are clearly within such a class. On the other hand, a newspaper proprietor who offers recommendations of financial speculations (*De La Bere* v. *Pearson* [9]) or racing information should clearly be excluded from this category.[45] In America the liability has been imposed on public weighers (*Glanzer* v. *Shepard* [15]) and doctors (*Edwards* v. *Lamb* [46]). The analogy with the duty of those in public callings is striking,[47] but the law on the subject is burdened with too much subtle learning to provide more than a rough guide for a duty-situation in negligence.

(2) *To Whom Should A Duty Be Owed?*

This inquiry is the most vital in this context. It is submitted that the normal test of foresight is inapplicable, and that in this respect the duty, if it be recognised at all, should differ sharply from that owed in respect of chattels. The manufacturer of chattels is liable to any person whom he ought reasonably to have foreseen might be injured by the dangerous chattel. Should the certifier of accounts be liable to anyone whom he ought reasonably to foresee would suffer harm from the false statement therein?

The dangers of over-generalising emanate not only from the inaccuracy of the generalisation itself, but often from the more insidious effect of it obscuring the intermediate area between atomisation and generalisation. The major exceptions of general liability for the consequences of an omission and for harm that is purely pecuniary, which must always qualify Lord Atkin's attempt to restate a general principle of liability in negligence [33] are too well known to lead to misapprehensions in citing *Donoghue* v. *Stevenson*.[3] But it calls for protest when the acceptance of the "Neighbour" doctrine and of Reasonable Foresight as the theoretical basis for the present categories of negligence leads to an unnecessary setback in the establishment of a new liability which,

[44] Lord Macmillan in [1932] A.C. 562 at 619.
[45] The fears, *e.g.*, of Sir John Latham (25 Austr.L.J. 295) would seem unjustified.
[46] 69 N.H. 599.
[47] Thus Fullagar J. (*op. cit.* 288) suggests that *Dickson* v. *Reuter's Telegram Co.* (1877) 3 C.P.D. 1, *Cann* v. *Willson* and *Le Lievre* v. *Gould* are not concerned with the rule in *Donoghue* v. *Stevenson* at all. "The cause of damage in cases like *Cann* v. *Willson* is not the making of a representation as such but the negligent performance of a task undertaken by the defendant."

while having all the appearance of being just another duty-situation in negligence, should in fact differ from the recognised categories in at least this one important respect.

Donoghue v. *Stevenson* [3] itself was a case of chattels put on to the market by a negligent manufacturer. No one claims that the liability which was imposed by the House of Lords in that case was an exercise in legal logic or a Blackstonian revelation : it was a conscious act of judicial legislation based on public policy and expediency. The defective condition of chattels, machinery and premises will inevitably cause physical harm to the person or property of those citizens who use them. It is the traditional province of the common law to protect subjects from such harm; it is only common sense to recognise that the average consumer in our industrial society would expect of those who supply him (for profit) with the articles and instruments that he needs a certain minimum standard not only of honesty but of care and skill; it is not unreasonable to require that minimum from such manufacturers and controllers. The recent decisions imposing stricter liability upon the occupiers and controllers of defective premises (*e.g.*, *Mint* v. *Good*,[48] *Heap* v. *Ind Coope & Allsopp, Ltd.*,[49] *Pearson* v. *Lambeth Borough Council* [50]) illustrate the social basis of the law in cases where physical harm is caused by the fault, whether actual or imputed, of him who controls the situation giving rise to that harm. But a comparison of the range of defences open to a defendant in a defamation action and to one sued in trespass indicates the different attitude which the law adopts in cases where there is no physical damage. Such a liability as that imposed for dangerous chattels is not desirable where the negligence lies in statement merely. So Judge Jeremiah Smith wrote as long ago as 1901 : "Even if the law recognises that there may be such a thing as a duty in the use of one's tongue, it does not necessarily follow that the duty should be held to be as universal and as far-reaching as the duty to be careful in the use of one's axe. The cases differ both in the stringency of the reasons for establishing a duty and in the weight of the burden which would thus be imposed." [51] These words of an American jurist put in a nutshell the argument of this paper. Yet there is implicit in the judgments in *Candler* v. *Crane, Christmas & Co.*[1] and especially in Asquith L.J.'s [52] discussion of the difficulties which the concept of proximity would create if brought into such a principle as was urged by counsel for the plaintiff in that case,[53] the underlying idea that liability for negligence in word must inevitably operate in the same way as that

[48] [1951] 1 K.B. 517.
[49] [1940] 2 K.B. 476.
[50] [1950] 2 K.B. 353.
[51] 14 Harvard L.R. 195.
[52] As he then was.
[53] [1951] 2 K.B. at 194–5.

for negligence in act. Small wonder that such a proposition met with a denial that was not even reluctant.

The compilers of the Restatement, commenting on their distinction between what is our *Donoghue* v. *Stevenson* [3] type of liability and that under discussion, say : " It comes from the fact that it " (*i.e.*, the information) " is supplied for guidance in a business transaction and not for guidance in a matter in which the safety of persons, land or chattels is involved." We can freely deny, with Bowen L.J., " that what a man writes on paper is like a gun or other dangerous instrument." [54] But the difference in modern society is not one of black and white : the shades of danger are relative and the law is not incompetent to recognise them. It is precisely because the law is more concerned with making physical harm actionable than with redressing a bad bargain that the scope of liability must be restricted. And this is not because the " dangerous thing " is in these cases intangible, but because it threatens business interests and not personal safety. The duty, if any, must not be imposed for reasonable foreseeability of reliance upon the statement but for some other relationship between plaintiff and defendant. Asquith L.J. was quite right in pointing out [55] that the " unidentifiability in advance " of the ultimate consumer of the ginger-beer did not displace the manufacturer's liability in *Donoghue* v. *Stevenson*.[3] But only in blind undiscriminating reliance upon Lord Atkin's dicta in that case can it be claimed that the liability of the manufacturer and the accountant should be identical. That such is in fact claimed is further proof of the weakness of our precedent system and the faith that it inspires in dicta instead of underlying principles.

Most critics of the dicta limiting the general principle of Lord Atkin (such as that of Wrottesley J. in *Old Gates Estates* v. *Toplis* [56] where he described it as " confined to negligence which results in danger to life, danger to limb or danger to health ") spoil their case. For the present purpose there is no need to deny these limitations: Lord Atkin himself referred to " injury to the consumer's life or property." [57] That is another argument. The question rather is: what *is* the principle to be applied to our new case if Lord Atkin's is inapplicable? The fact is that the majority speeches in *Donoghue* v. *Stevenson* [3] contain three separate propositions.

(a) The ratio itself was the addition of the manufacturer's duty to the categories of duty-situations. This was a conscious piece of policy law-making.

(b) Lord Atkin's broad phraseology indicates the general principles on which new duty-situations regarding physical

[54] [1893] 1 Q.B. 491 at 502.
[55] [1951] 2 K.B. at 194.
[56] [1939] 3 All E.R. 209.
[57] [1932] A.C. at 599.

danger can be created. He himself said that he was doing nothing more than attempting to find the common principle behind the then recognised categories, all of which concerned physical damage. This principle he found in the "Neighbour" doctrine.

(c) But there is assumed throughout an unconscious statement of the scope of the tort of negligence with which the dogma of foresight must not be confused. Foresight is an admirable and accepted criterion for damage to person and property: it cannot unthinkingly be applied to pecuniary loss. Herein lies the force of Charlesworth's thesis [38] that there is neither a general duty of care nor particular duties of care to prevent financial loss because such a duty would involve too great a liability in damages. Of course it would, were foresight the test. But the cases should not be equated. If they were, accountants would be liable for the triple indeterminate of Cardozo J.: "in an indeterminate amount for an indeterminate time to an indeterminate class." [39] But the recognition of the desirability of making actionable negligent conduct which results in damage *of any sort* (a recognition which was the "inarticulate major premise" of *Donoghue* v. *Stevenson* [1] and which was made belatedly by the common law) does not by any means involve the proposition that foresight is the only test for every type of negligence liability. To say that once an accountant is negligent he is liable for all foreseeable damage which is the consequence of his negligence is to take Lord Atkin's dicta further than was meant. He cannot have intended the breadth of his principle to have killed at birth different liabilities similar to the case with which he was dealing only in the negligent character of the conduct giving rise to them.

It is often said that there can be no negligence in the abstract. This enigmatic phrase has its true frame of reference in the classification of conduct and not in the imposition of liability. Its ambiguity is traceable to the *damnosa hereditas* of the old forms of pleading, to the double meaning of the word "negligence." No one can point to an act and say, ignorant of its circumstances and consequences, that it was in law a negligent act. The supreme proof of this lies in the infant cases like *Yachuk* v. *Oliver Blais* [40] where an act which would certainly have constituted contributory negligence in an adult did not deprive a child of his remedy. The careless character of the act must be ascertained by reference to some consequence of it: we use the test of whether a reasonable man would have foreseen the harmful consequences which someone in

[38] *Law of Negligence*, 2nd ed., 1947 14–16.
[39] 255 N.Y. 170 at 179.
[40] [1949] A.C. 386.

plaintiff's position might suffer as a criterion of the quality of defendant's conduct. But the further question, whether defendant should be liable for the consequences of his admittedly careless conduct, is a separate matter. The fixing of the nexus which will finally impose liability on a man guilty of careless conduct towards the victim of its consequences is a different inquiry altogether. In the normal case of manufactured goods the same test of foresight gives the radius required by the social need, for it covers the ultimate consumer or user. But this coincidence is the result of the expediency of the same test being suitable for both inquiries: it is not a necessary element of all liability for negligent conduct. There is no reason why the law, having selected a satisfactory test for the type of conduct it deems blameworthy, should not adopt a wider or narrower test for the establishment of the duty-nexus which will connect the careless conduct in law with the harm suffered (and this time, unlike the passive connection made to fix defendant's conduct as careless, an active onerary one). Whether it does so or not is entirely a matter of sociological expediency. To take a wider test is to abandon all incidence of the retributive principle and to trespass into the preserves of strict liability. But narrower tests are at hand to meet the need.

The possible tests seem to be five in number. In order of increasing stringency they are: reasonably foreseeable reliance, intended reliance, actually known reliance, requested reliance and contracted reliance. The first one, as will have appeared, is admittedly too wide for English law.[81] The last is admittedly too narrow. The choice remains between the other three.

(i) *Knowledge of Reliance.* This is Denning L.J.'s suggested test. "Did the accountants know that the accounts were required for submission to the plaintiff and use by him?"[82] Thus in *Candler's Case* the clerk Fraser knew this very well, and (on Denning L.J.'s view of the facts) the surveyor in *Le Lievre* v. *Gould*[10] did not know, because there was a reasonable probability of intermediate inspection. This is a pretty severe test which almost approximates to Dr. McKerron's view[83] that only the direct representee should have an action. Knowledge of reliance without necessarily knowing the identity of the person who relies

[81] Not apparently in South African law. So in *Perlman* v. *Zoutendyk* (1934) C.P.D. 151 at 161, Watermeyer J. said: "We must assume . . . 'that the defendant knew, or ought to have known, that the signed certificate would or might be used by Pienaar for the purpose of borrowing money on the security of the land . . . it seems . . . clear that a sworn appraiser who is a reasonable man and knows that his certificate of appraisement is to be used for the purpose of inducing someone to lend money on the mortgage of the property valued by him, ought to foresee that a negligently made valuation assessing the property at a grossly inflated value is likely to mislead and cause harm to the mortgagee. Consequently . . . defendant was on the facts stated . . . under a duty towards prospective mortgagees to take care." But the plaintiff failed owing to contributory negligence and other factors inducing him to lend.

[82] [1951] 2 K.B. at 181.

[83] "Liability for Non-defamatory Statements," (1930) 47 S.Afr.L.J. 359 at 371.

is a difficult idea to grasp and judge, and it is the cases where the victim is "unidentifiable in advance" that demand a workable principle by which to draw the line. There is also the danger that actual knowledge may in a hard case slip into imputed knowledge,[64] and the wide arc of chattel negligence will open up.

(ii) *Requested Reliance.*[65] It may be that reliance at the representee's request would be enough. The normal situation of plaintiff asking for information from an accountant but without insisting on a contractual obligation would be covered (*e.g.*, *Candler's Case*,[1] *Le Lievre* v. *Gould*[10] and *Cann* v. *Willson*[11]). But the cases where the request is from an intermediate person, as in *Ultramares Corporation* v. *Touche*[13] and *Glanzer* v. *Shepard*,[15] would be left outside and while it is appreciated that some line must be drawn, it is submitted that there is no moral distinction between a man issuing a certificate to another at his request knowing or intending that a third party will rely upon it, and a man who issues it at the third party's request. Nor does logic or convenience demand such a distinction. It is suspected that such a doctrine is no more than a version of the old heresy of confining tortious liability in negligence to the scope of contractual liability, the "contract-tort *catena*."[66]

(iii) *Intended Reliance.* This is the test adopted by the restatement in section 552: "the person . . . *for whose guidance* the information was supplied" and who justifiably relies upon it "in a transaction in which it was *intended* to influence his conduct" may sue.[67] It is intention that is relevant: the link with deceit is clearly discernible. It is significant that while the restatement has two sections under the second division of torts (negligence) dealing with bodily harm from negligent misrepresentation, the section which deals with the type of case under discussion (section 552) is under the fourth division (Deceit: Ch. 22 Misrepresentations and Non-disclosure in Business Transactions; Topic 8 Negligent Misrepresentations). Liability then in America requires a different element than foresight of damage. It requires, like deceit, *intended reliance.* The distinction which must be drawn as to the persons to whom a duty is owed is found in the deceit cases. Why was there liability in deceit in *Andrews* v. *Mockford*[68] and not in *Peek* v. *Gurney*?[69] Because in the latter the prospectus was aimed at prospective applicants for *new* shares and was not intended to be

[64] This trend is clearly visible in occupiers' liability law: knowledge of a potential danger was equated to knowledge of actual danger in *Pearson* v. *Lambeth Borough Council* [1950] 2 K.B. 353.

[65] I am grateful to Professor Lawson for this suggestion.

[66] See, *e.g.*, Winfield, *Province of the Law of Tort*, 73–75.

[67] My italics. Denning L.J. said in argument in *Candler's Case* (at 178): "It would appear that the negligently made statement which is false must be made to the plaintiff and that the defendant must *intend or know*" (my italics) "that the plaintiff will act on it."

[68] [1896] 1 Q.B. 372.

[69] (1873) L.R. 6 H.L. 377.

acted upon by one who bought shares already on the market; while in the former the prospectus was repeatedly issued to rig the market, and any member of the public who acted upon it had an action, for he was intended to rely upon it. Intention and knowledge are equally hard to prove in evidence, yet there is a rich fund of experience in all the old deceit cases where the distinction has always been made. It is submitted that this is the most satisfactory test, and the best-known cases which the common law, here and abroad, has had to decide will be discussed from this aspect. They fall into two categories.

(1) *Where there is intended reliance by one person*[70]

The clearest case is where the misstatement is made directly to plaintiff, who is therefore identified in advance.

> *De La Bere* v. *Pearson*.[9] A negligently recommended a dishonest broker as reliable to B, a reader of his newspaper in which such recommendations were gratuitously offered. The case supposedly went on breach of contract, though it is hard to justify on that ground.[18]

The situation is indeed near to contract, though in many cases there would be no evidence of contract.

> *International Products Co.* v. *Erie R.R. Co.*[71] A's goods were about to be landed, and were to be bailed with B on arrival. B negligently misrepresented their location in reply to A's inquiry which B knew to have been made for the purpose of insuring them. In fact they had not yet arrived. Andrews J., giving the judgment of the New York Court of Appeals, held B liable for A's loss in failing to collect compensation on the policy when the goods were accidentally destroyed by fire. So at the time of the misstatement there was no relationship either in contract or bailment, but B patently intended his prospective client to rely on his statement. Quaere whether B could come within the professional category. If not, it is clear that even that limitation will not remove all injustices.

Another situation, still of direct statement, but not at direct request, is where A employs B to certify something and to give a copy of the certificate to C, who is to B's knowledge about to enter into some transaction with A on the strength of such certificate. This is the orthodox explanation of the next case.

> *Le Lievre* v. *Gould*.[10] B was appointed surveyor by A, a

[70] The cases where an agent is held impliedly to warrant his authority are really in this class (*Collen* v. *Wright* (1857) 8 E. & B. 647), but because there is liability irrespective of fraud or negligence, they have curiously escaped the effect of *Derry* v. *Peek* (Fullagar J., *op. cit.*, 283).

[71] (1927) 244 N.Y. 331.

builder-owner of property who was about to mortgage to C, and told to give a copy of his reports of building progress to C. After his appointment the mortgage deed was executed, containing a clause releasing C of his obligation to advance unless "his surveyor" certified progress. B was ignorant of this clause, and it must be inferred that C was intended by him to act upon the certificate, unless it can be extracted from the facts as stated that B was ignorant of the whole mortgage and proposed loan.[12] The Court of Appeal held B not liable to C for C's loss when the certificate turned out to be negligently erroneous. The case is probably an authority against the principle here argued.

Glanzer v. *Shepard*.[13] This is a similar American case, where a merchant A gave beans to a public weigher B to weigh, the weight to decide the price payable by C who had bought them from A. B, who was told of the sale to C, was instructed by A to send C a copy. C recovered the loss he made by paying the price according to the negligently overstated weight. There was no contract between B and C, although the return recited that it had been made "by order of" A "for" C. C's use of it was not, said Cardozo J. for the New York Court of Appeals, "an indirect or collateral consequence of the action of the weighers. It was a consequence which, to the weigher's knowledge, was the end and aim of the transaction."

It is into this class that the case which prompts this discussion falls.

Candler v. *Crane, Christmas & Co.*[1] A, B's accountant, issued negligently erroneous accounts on which he knew C would rely in advancing money to A. The Court of Appeal held by a majority that there was no liability in negligence. The important part of the facts is the following sentence: "The judge expressly found that, when the meeting of the 17th broke up, Fraser must have been satisfied, not only that the plaintiff was considering an investment in the company, but that he was taking with him and relying on the draft accounts which he had prepared."[13] Fraser was A's clerk. It will be noted that there is enough evidence as reported for finding an intention that C rely, although that specific question was neither put nor answered.

A further type of case in this class is where the misstatement is not direct, but goes through a third party, and where although the identity of the plaintiff is not known in advance, yet it is known

[12] Contrast the different conclusions of Asquith L.J. (as he then was) in *Candler's Case* (at 194) and of Fullagar J. (*op. cit.* 280).
[13] [1951] 2 K.B. at 167.

that only one person will be involved. The question is always one of intention, but since the prima facie evidence of intention (*i.e.*, directness) is lacking, there must be extraneous evidence of it from the circumstances and nature of the transaction.

> *Mulroy* v. *Wright*.[14] A knew that the certificate (stating property to be unencumbered) which he supplied to B, who was about to sell, was to be relied upon by the eventual purchaser. The Minnesota court held there was a duty of care despite the ignorance of the eventual purchaser's identity. The request theory would reverse this.

And this is the place of a celebrated case in the English textbooks.

> *Cann* v. *Willson*.[11] A, who wanted to mortgage Blackacre, was requested by his solicitors to get a valuation. He employed B to value and to send the report to the solicitors, who specially told B its purpose and the responsibility he was undertaking. The solicitors communicated the negligently false valuation to C, who made an advance on the strength of it. Chitty J. held B liable to C in the amount by which Blackacre proved insufficient to answer the loan. This too is counter to the request theory.

It is evident therefore that even where defendant does not deliberately and purposely place the certificate or information in plaintiff's hands, there may be further evidence of his intention (and, *a fortiori*, knowledge) that plaintiff rely on it, even in the absence of his knowledge of plaintiff's actual identity. It is interesting to find Lord Loreburn making the same point in a Scottish case about evidence of inducement in deceit: "He was none the less induced by the letter that it was not, in fact, either addressed to or seen by him, for its effect was accurately stated to him in pursuance of the writer's intention, and he acted upon it."[15]

(2) *Where there is intended reliance by a class of persons*

After stating his suggested principle in *Candler's Case*,[1] Denning L.J. continued: "Whether he would be liable if he prepared his accounts for the guidance of a specific class of persons in a specific class of transactions, I do not say. I should have thought he might be. . . ."[16] It is when we enter the domain of the last of Cardozo J.'s triple indeterminates that fears of such a principle getting out of hand may appear justified. But the element of intention is still useful as a limiting factor. Two leading cases from different sides of the Atlantic illustrate this.

> *Derry* v. *Peek*.[3] A, the director of a company, issued a

[14] (1931) 240 N.W. 116.
[15] *Robinson* v. *National Bank of Scotland*, 1916 S.C. (H.L.) at 184.
[16] [1951] 2 K.B. at 183–184.

prospectus upon which B, as a purchaser of shares, was intended to and did rely. Negligence was not pleaded as such, and the House of Lords held there was no deceit. No case could be clearer of a duty owed under our principle,[77] since the class of prospective shareholders was intended to rely, although the case does not fit the request theory. However, statute apart, a director is not one whose profession it is to supply information to the public, and is probably not one whose business it is to do so either. There was a different result in the American case.

Doyle v. *Chatham & Phenix Bank*.[78] B relied on A's certificate that a collateral security for bonds consisted in car dealers' notes. In fact they were worthless and the collateral insufficient. The New York Court of Appeals held for B in negligence. Kellogg J. for the court, said: "They were issued for the very purpose of establishing a relationship of trustee and *cestui que trust* between the defendants and persons who might rely thereon."

This is the place for a more recent, but no less controversial English case.

Old Gates Estates v. *Toplis*.[79] Promoters purchased Blackacre and employed a valuer Russell to value it. The company which was formed later failed to recover its loss from negligent over-valuation. Wrottesley J. said[80]: "Hutton" (one of the promoters) "had reserved Russell for the role of a person who was to appear as the independent valuer in the prospectus when the prospectus came to be issued, and this was indeed held out by Hutton to Russell as an inducement to him to give his advice. . . ." Russell knew the purpose of the report, but the negligence lay not in his own work but in the figures supplied by him to the anticipatory agents of the company themselves. It was a clear case of contributory negligence.

The difficulty is always to distinguish merely foreseeable and actually intended reliance. No case could be nearer the borderline than another New York case from which Cardozo J.'s judgment was much cited in *Candler's Case*.[1]

Ultramares Corporation v. *Touche*.[13] The Stern company employed public accountants A to draw up a balance sheet and

[77] See Cotton L.J., 37 Ch.D. 367–368. Fullagar J. says of the learned Lord Justice's proposition there: "If we examine it as an abstract proposition, we shall not immediately or readily say that it states a principle inappropriate to a great system of law or a principle ill-adapted to the use of those whose unenviable function it is to say justly whether a loss shall lie where it falls or be placed on some other shoulders than those of the immediate sufferer" (*op. cit.* 281).

[78] (1930) 253 N.Y. 369.

[79] [1939] 3 All E.R. 209.

[80] *ibid.* at 210.

asked for 82 copies (it was a one-man company). The corporation advanced on the strength of this and was a victim of A's negligent error. The Court of Appeals held there was no liability in negligence. Cardozo J. said : " The defendants knew . . . that in the usual course of business the balance sheet when certified would be exhibited by the Stern company to banks, creditors, stockholders, purchasers and sellers . . . as the basis of financial dealing." But " nothing was said as to the persons to whom these counterparts would be shown on the extent or number of the transactions in which they would be used." Cardozo J. made two distinctions between this case and *Glanzer* v. *Shepard*.[15] One was that whereas there the upper limit of liability was fixed (*i.e.*, the value of the beans, a fixed and insurable sum), here it was not. The second was that the report was primarily for the information of the Stern company whereas in *Glanzer* v. *Shepard* [15] it was primarily for the third party's information.[81]

Obviously a one-man company has other uses in mind for 82 copies of a balance sheet (which in business circles is always meant for outside consumption) than self-gratification. But the extent of liability once admitted was enormous, and the lesson of the *Touche Case* [13] (which must go the other way if known and not intended reliance is enough and the irrelevance of the actual unidentifiability in advance of the plaintiff is copied from *Cann* v. *Willson* [11] and *Mulroy* v. *Wright* [12]) is that in this second situation, where a class and not one person is in question, stronger evidence should be required of intention of outside reliance. The fact may be important that the service was primarily rendered for the intermediary and the report not openly published. Thus in *Derry* v. *Peek* [3] the prospectus was issued with the direct benefit of the issuers in mind and was put directly into the hands of the prospective purchasers. These considerations do not weigh in *Candler's Case* [1] which is nearer to *Glanzer* v. *Shepard* [15] than to the *Touche Case* [13] in that only one person was aimed at.

(8) *In What Circumstances and In Respect of What Transactions Should A Duty Be Owed?*

(a) The statement must be in the course of the defendant's business. The man who invites the opinion of a valuer friend over dinner cannot justifiably expect more than honesty : if he takes it as a client at the valuer's office he is entitled surely to care and skill. Kerbstone opinion is clearly not included in the principle.

(b) The transaction in which the loss was suffered must be one in which the information was intended to induce action. This is

[81] See Professor Seavey's criticism of these distinctions in 52 Harvard L.R. 372 at 398–404.

the explanation of *Humphery* v. *Bowers*[83] and *Australian Steam Shipping Co.* v. *Devitt*.[83] In both cases a Lloyd's surveyor negligently passed a ship as within certain Lloyd's classifications of fitness. Plaintiffs were intended to rely on the statement, but only in transactions with Lloyd's for the purpose of registration, and not in preparing for voyages. It may be that the uncertain facts of *Le Lievre* v. *Gould*[19] may yield the conclusion that the certificates were issued to and at the request of the owner for the purpose of knowing how much he should pay the builder, and not so as to induce the mortgagee to advance money. Denning L.J. applies the same test to *Everett* v. *Griffiths*[84] in which the doctor of an insurance company certified insanity for the purposes of the insurance company only: the statement was not meant to be relied on in any other transactions. This really seems to dispose of the ubiquitous marine cartographer. Unless he is chartered to map for a specific expedition, there is no particular transaction in which it can be said that reliance was intended. It may be that the statement is so bound up with an act (such as the setting of instruments) that the case is removed out of misstatement into the field of physical negligence, as Dr. W. L. Morison suggests,[85] but otherwise it seems academic to talk of a map-maker being liable for the *Queen Mary* sinking.[86]

(c) The normal defences will be available, including remoteness of damage or insufficient participation in causation (*e.g.*, that other factors than the report induced the plaintiff's action). But the most fruitful one is contributory negligence. It might be said that a person who relies blindly on information supplied by anyone other than a professional man whose business it is to supply that type of information to the public is defeated by contributory negligence.[87] That would eliminate the necessity of limiting the liability to professional men and achieve the same result. In any event the availability of the defence has the effect of making the area of liability even smaller.

It is now submitted that it is open to the House of Lords to reverse *Candler's Case*,[1] or at least to adopt some narrower

[83] (1929) 45 T.L.R. 297.
[83] (1917) 33 T.L.R. 178.
[84] [1920] 3 K.B. 163; [1921] 1 A.C. 631.
[85] 67 L.Q.R. 221.
[86] Professor Seavey explains this as excluded by remoteness of damage (67 L.Q.R. 480), Asquith L.J. (as he then was) and Winfield (*Tort*, 392) treat it as nevertheless within the principle, Denning L.J. excepts it properly on the ground of no specific intended transaction.
[87] *cf.* Professor Price in the articles cited in note 28, *supra*. So in *Jaillet* v. *Cashman* ((1923) 235 N.Y. 511) an American court refused to impose liability for newspaper items or stock ticker reports, for reliance on such hasty statements is not justifiable. As Andrews J. said in the *Erie Case*: "the relationship of the parties, arising out of a contract or otherwise, must be such that in morals and good conscience the one has the right to rely upon the other for information, and the other giving the information owes a duty to give it with care."

principle, and to restore *Derry* v. *Peek*[3] to its rightful place as the leading case on deceit. We seem today to be nearing the fulfilment of Pollock's hope[88] that *Derry* v. *Peek*,[3] if it delayed, would not altogether prevent the working out of a principle of negligence in word: professional opinion is more favourable than it was, say, 30 years ago. Study of the American authorities is helpful in this connection, and it is hoped that the foregoing discussion has suggested some of the lines that such a principle could take and the practical results of its adoption.

Finally, supposing that a principle such as that outlined here or that suggested by Denning L.J. with the immediate approval of many learned writers,[89] is incorporated into English law by a House of Lords decision, how would it square with theory? In the usual terminology, a new duty-situation would be created. The basis of choice of these "categories of negligence" is obscure: it would seem to be policy and the analogies of precedents. But would it be true to say of the suggested new category that Lord Atkin's indication of when liability arises within the situation holds? The question of which comes first, duty of care or foreseeability, is a conundrum the answer to which is unnecessary to the point made here.[90] A new liability is being discussed by lawyers which they are prepared to recognise, if they recognise it at all, as another example of negligence. And yet none of its advocates claim that the accountant should be liable for all foreseeable injury resulting from the use of his certificate in the same way that the manufacturer is liable for all foreseeable injury resulting from the use of his chattel. Foresight in the former case would only be relevant to the question whether defendant's conduct was sufficiently careless to deserve legal recognition as such, and not to the question whether liability will be imposed for it. That final step would go on intention, or knowledge, or request. The difficulty of the matter may lie in the fact that since this part of the law is at a formative stage, the courts are jealous to treat most questions as questions

[88] *Tort*, 14th ed., 444 *et seq.*

[89] *e.g.*, Dr. Goodhart (67 L.Q.R. 177), Professor Seavey (67 L.Q.R. 466), Dr. McKerron (68 S.Afr.L.J. 320) and Dr. Street (14 M.L.R. 345).

[90] See, *e.g.*, Buckland, *Some Reflections on Jurisprudence*, 110–115, and Lawson, *The Duty of Care in Negligence* (1947) 22 Tulane L.R. 111. Thus Dr. McKerron says of *Candler's Case* that it "illustrates a point which is often overlooked, namely, that the requirement of a duty of care serves a twofold purpose. In the first place, it serves to determine whether the damage done to the plaintiff is imputable to the defendant. Secondly, it serves to determine whether the defendant's conduct is to be adjudged wrongful in relation to the plaintiff; in other words, whether the situation is one in which the plaintiff should be accorded a remedy. The second aspect is logically anterior to the first: the court is not called upon to pass upon the question of imputability until it has first decided whether the defendant's conduct is capable of entailing liability. So far as the first aspect is concerned, the test is the foresight of a reasonable man; situated in the same circumstances as the defendant. So far as the second aspect is concerned—the aspect with which the instant case was concerned—there is no such test: in the absence of precedent it is a question of judicial policy" (68 S.Afr.L.J. 324).

of law and not as questions of fact. The existence of a duty of care is a question of law; the existence of contributory negligence or remoteness of damage is one of fact. So a system by which there is prima facie duty wherever there is foreseeable injury from defendant's conduct, whether by act or word, breach of which is not redressible where plaintiff's conduct was itself unjustifiable or other causes operated concurrently to effect the injury, is denied us.[91] The limitations which logically are better when operating outside the duty and narrowing its radius from the outside, must in this case be brought inside the duty to operate internally in its definition and imposition. The result does damage to the symmetry of the Esher-Atkin definition. It is suspected that such a development in English case-law would go a long way to assist the academic lawyers in the struggle to isolate the juristic basis of negligence liability, and that it may be discovered that the Esher-Atkin definitions do not after all exhaust the field even acknowledging their admitted shortcomings in the matters of omissions and pecuniary loss. Perhaps the new action, if it be admitted, will be placed alongside deceit or liability in common callings, or made a liability *sui generis*, but the juristic basis of attaching liability to carelessness in a more limited area than that of foresight will remain to be solved.

R. G. WILSON.[92]

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[91] This is the theory advanced by Professor Price: it is certainly more true of the majority of civil law systems than of the common law.

[92] B.A. (oxon). Mr. Wilson is at present reading for the degree of B.C.L. at Brasenose College, Oxford.

WHAT IS INCOME?

"THERE can be no doubt that, in the natural and ordinary meaning of language, the income of a bank or trade for any given year would be understood to be the gain, if any, resulting from the balance of the profits and losses of the business in that year. That alone is the income which a commercial business produces, and the proprietor can receive from it."[1]

This is only one of many judicial definitions of income,[2] apart from innumerable definitions not by words, but by implication. The distinction of income from capital is, ultimately, an arbitrary one, as Lord Herschell saw in *Bouch* v. *Sproule*.[3] In their attempts to make it the judges have referred inter alia to the opinions of economists[4] and of judges in other jurisdictions, especially the United States of America.[5] The doubtful compliment is returned, as witness Lord Keynes[6]: "Our definition of *net income* comes very close to Marshall's definition of *income*, when he decided to take refuge in the practices of the Income Tax Commissioners and—broadly speaking—to regard as income whatever they, with their experience, choose to treat as such. For the fabric of their decisions can be regarded as the result of the most careful and extensive investigation which is available, to interpret what, in practice, it is usual to treat as net income."

But whilst economists and others may take refuge in judicial decisions, the judges can find no refuge from their function of

[1] Sir Montague E. Smith, *Lawless* v. *Sullivan* (1880) 6 A.C. (J.C.) 373, 378–379.

[2] A representative assortment may be found in *Words and Phrases Judicially Defined*, 1944 ed., by Sir Roland Burrows, Vol. III, pp. 80–84.

[3] (1885) 12 A.C. 385, 393: "The division of the enjoyment of property between tenant for life and remainderman is itself artificial."

[4] See, *e.g.*, Sankey J. in *Pool* v. *Guardian Investment Trust Co., Ltd.* [1922] 1 K.B. 347, 359.

[5] In *I. R. Comrs.* v. *Blott* [1921] 2 A.C. 171, Lord Finlay at p. 195 quoted Pitman J. in the United States case of *Eisner* v. *Macomber*, 252 U.S. 189, 207, 1920, as saying: "Here we have the essential matter; not a gain accruing to capital, not a growth or increment of value in the investment, but a gain, a profit, something of exchangeable value proceeding from the property, severed from the capital however invested or employed, and coming in, being 'derived' that is, received or drawn by the recipient (the taxpayer) for his separate use, benefit and disposal; that is income derived from property. Nothing else answers that description." In *Pool* v. *Guardian Investment Trust Co., Ltd.* [1922] 1 K.B. 347, Sankey J. at p. 358, after quoting various definitions by economists, repeated the words of Pitman J., and particularly stressed that "the essential matter is that income is not a gain accruing to capital, but a gain derived from capital." This is very subtle. He then enunciated what he called "the true test as to whether a distribution of shares falls to be taxed," which he concluded depends on two questions: (1) whether there has been a release of assets, (2) if so, whether the assets released were capital.

This test is criticised by Professor Bailey in his article on "Settled Shares in a Company," 67 L.Q.R., April, 1951, p. 195. To Professor Bailey's detailed discussion of this whole subject my debt is both real and apparent.

See also W. Strachan, 46 L.Q.R. 334.

[6] *The General Theory of Employment, Interest and Money*, 1944 ed., p. 59.

making decisions on the facts before them which, for good or ill, declare the law for the future. The danger that isolated decisions on particular aspects of a subject may not harmonise when placed beside each other is inherent in the inductive process of the English courts and it is submitted that this is the position today in respect of decisions on capital and income in the two fields of trusts and taxation. The following singularly inconsistent rules may be extracted from these decisions, of which rules (1), (4) and (6) appear to merit particular attention.

1. If a company pays a dividend from profits in cash or in stocks or shares in another company (hereafter referred to as "extraneous stock or shares"), such payments are income in the hands of a trustee shareholder, who must hold them for the exclusive benefit of the tenant for life,[7] even though the "other company" is, as the result of nationalisation legislation, the compulsory statutory successor to the first company.

Although the capital value of the shares may fall considerably after the announcement of such a dividend, no apportionment between tenant for life and remainderman will be ordered unless a breach of trust by the trustee can be proved.[8]

2. If, however, the shares in the original company are bought with capital moneys for an investment, at a time when the purchaser knows that a distribution of such extraneous stock or shares is contemplated, the stock or shares later distributed will also be capital and the tenant for life cannot claim them or the proceeds from their sale.[9]

So also if the profit accrues in respect of a particular transaction which was completed before the death of the testator (in the case of a settlement by will), and the payment in cash or extraneous shares is made after his death, such payment forms part of the settlor's capital estate, and is not income of his residuary trust fund.[10]

[7] *Maclaren* v. *Stainton* (1861) 3 De G.F. & J. 202; *Re Piercy* [1907] 1 Ch. 289; *Re Bates* [1928] Ch. 682; *Hill* v. *Permanent Trustee Co. of New South Wales, Ltd.* [1930] A.C. 720 (J.C.); *Re Doughty* [1947] Ch. 263 (C.A.); *Re Harrison's Will Trusts* [1949] Ch. 678; *Re Sechiari* [1950] 1 All E.R. 417, 66 T.L.R. (Pt. 1) 581.

In *Re Sechiari* the only authority quoted was the decision of the Privy Council in *Hill* v. *Permanent Trustee Co. of New South Wales*. That decision, however, approved *Re Bates*, which appears to have been decided on the sole authority, then 67 years old, of *Maclaren* v. *Stainton*, on which see *post*.

[8] *Re Sechiari* [1950] 1 All E.R. 417; *Re Klenwort's Settlement Trusts* [1951] Ch. 860; *Re Budd's Will Trusts* [1952] 1 All E.R. 254.

[9] *Re Maclaren's Settlement Trusts* [1951] 2 All E.R. 414: a salutary decision, in which Harman J. rejected a claim by the tenant for life, based on the decision in *Re Sechiari*, to snatch an even quicker profit at the expense of remaindermen in this type of transaction.

[10] *Re Winder's Will Trusts* [1951] Ch. 916: an extension of the decision in *Re Muirhead* [1916] 2 Ch. 181, in which it was held that the Apportionment Act, 1870, applied, to a dividend declared after the death of a tenant for life in respect of a period completed before his death, so that the whole of the dividends accrued to the estate of the tenant for life. The facts in *Re Winder's Will*

3. If the amounts received by the tenant for life under (1) above are profits of trade, for which the company is liable to income tax, they form part of his income for tax purposes whether received in cash or in shares in another company.[11]

4. But if they represent sums on which the company is not liable for income tax, but which are capital profits, either made in past years and retained to increase the value of the company's assets, or realised on a sale of assets, although they are income in the hands of a trustee shareholder and payable to the tenant for life, in the hands of the latter they become capital and not subject to any tax.[12]

5. Whatever the origin of the profits from which a dividend is declared, if at the time it is declared the shareholders are invited to reinvest the dividend in newly issued shares in the company, then the company is said to have "capitalised"[13] these sums; the new shares are therefore capital in the hands of a trustee shareholder, who must hold them for the benefit of the remainderman.[14]

Trusts were distinguishable on several grounds from those in *Re Jowett* [1922] 2 Ch. 442, in which the operation of the Apportionment Act was restricted, as regards dividends, to those expressed to be made in respect of some definite period.

[11] *Pool* v. *Guardian Investment Trust Co., Ltd.* [1922] 1 K.B. 847; *Briggs* v. *Comrs. I.R.* (1922) 17 T.C. 11. The procedure in fact adopted is that, whether the company deducts income tax from the shareholder or not, when paying dividend:

(1) The shareholder's net receipts in respect of the company's trading profits are "grossed up" for the purpose of computing his income, on which he may be liable for tax at the standard rate, or a lower rate, or the higher rate now known as surtax (formerly super-tax); and
(2) he is credited with payment of tax at the standard rate on such receipts;
(3) if, because of the smallness of his total income, he is liable only at the lower rate, he receives a rebate of tax, whereas if he is liable to surtax an additional demand is made upon him.

But note Finance Act, 1922, s. 21 (as amended), under which a company's undistributed income may, in certain circumstances, be treated as that of its members.

[12] This appears always to have been practice accepted by the Crown. In *Gimson* v. *I.R. Comrs.* [1920] 2 K.B. 246, 248, the Crown did not dispute that dividends of a capital nature were not assessable to income tax; in *Neumann* v. *I.R. Comrs.* [1934] A.C. 215, Lord Tomlin said at p. 228: "It is not disputed that if a dividend is paid out of profits produced by a sale of a capital asset it is not made out of profits or gains charged on the company, and therefore no deduction from the dividend is authorised and the dividend itself is not liable to be taken into account in fixing the liability to surtax of the shareholder."

There seems no logical reason why, because capital profits are exempt from tax on income when in the hands of the company, they should necessarily be exempt in the hands of the shareholders, since the company holds its assets in its own right and not as agent for the shareholders. The rule may be an anomalous survival from the former doctrine that the company paid tax as an agent of its shareholders (see *Gilbert* v. *Fergusson* (1881) 7 Q.B.D. 562. This theory, frowned upon by Lord Cave in *Blott's Case*, is now discarded, see *Barnes* v. *Hutchinson* [1940] A.C. 81, and Farnsworth's *Income Tax Cases*).

[13] An expression much distrusted by Lord Dunedin and Lord Sumner; see note 80, *post*.

[14] *Bouch* v. *Sproule* (1887) 12 A.C. 385; and this is so even if the tenant for life has been left "dividends, bonuses and income," *Re Speir* [1924] 1 Ch. 359, C.A.

6. In the case of (5) above, no tax on income is payable by the recipient of the dividend so reinvested.[15] And this is so even if the company gives shareholders the option of taking up the new shares or receiving the dividend in cash,[16] at least as regards those who take shares, and possibly even those who take part cash and part shares.[17]

Nor is such tax payable if the profits are distributed in the form of debenture stock,[18] and this may still be so even if the debentures are repayable at short (*e.g.*, one month's) notice[19] (*sed quaere*).

7. If a company ceases trading and distributes capital profits before winding up, they will be income in the hands of a trustee shareholder and come under rules (1) and (4) above[20]; after winding up, however, any assets distributed are capital, and no tax on income is payable on them.[21]

8. If a company issues shares at a premium, the premiums received must be transferred to a share premium account[22] which for practical purposes is regarded as issued share capital.

Provided the requirements of the Companies Act, 1948, s. 66, are fulfilled, a company may always reduce its share capital with the sanction of the court, which is in practice never refused where the statutory requirements have been complied with, and this is so even where the reduction is disadvantageous to certain classes of shareholders[23] or is manifestly designed to evade the payment of profits or other taxes, or to evade, *e.g.*, possible nationalisation.[24] Money distributed to members either by way of return of capital

[15] *I.R. Comrs.* v. *Blott* [1921] 2 A.C. 171.

[16] *I.R. Comrs.* v. *Wright* [1927] 1 K.B. 838, C.A.

[17] Rowlatt J.'s decision to the contrary in *I.R. Comrs.* v. *Cole* [1926] 2 K.B. 246 was impliedly frowned upon in Scrutton L.J.'s judgment in *I.R. Comrs.* v. *Wright* [1927] 1 K.B. 838, C.A.

[18] *I.R. Comrs.* v. *Fisher's Executors* [1926] A.C. 395.

[19] So held by Rowlatt J. in *Whitmore* v. *I.R. Comrs.* (1925) 10 T.C. 645; but Macnaghten J. decided the other way in *Aykroyd* v. *Comrs. I.R.* [1949] 2 All E.R. 665, in which *Whitmore's Case* does not appear to have been cited. Rowlatt J. had followed the *ipsissima verba* in *I.R.Comrs.* v. *Fisher's Executors* of Lord Sumner, who there generalised the result of the majority decision in *Blott's Case*, with which he had expressed emphatic disagreement at the time. See *post*.

[20] *Hill* v. *Permanent Trustee Co. of New South Wales* [1930] A.C. 720.

[21] *I.R. Comrs.* v. *Burrell* [1924] 2 K.B. 52, C.A. But notice that the company's income is to be regarded as that of its members may still be served in respect of profits made by a company in the past under Finance Act, 1922, s. 21. See note 11, *supra*.

[22] Companies Act, 1948, s. 56.

[23] *Scottish Insurance* v. *Wilsons & Clyde* [1949] A.C. 462; *Prudential Assurance* v. *Chatterley-Whitfield Collieries* [1949] A.C. 512.

[24] *Ex p. Westburn Sugar Refineries, Ltd.* [1951] A.C. 625. See the analysis of this case by Professor Gower in (1951) 14 M.L.R. 380. This rule is an extension of that in *I.R. Comrs.* v. *Blott*, which, although it clearly established that a taxpayer is entitled to adopt any measures of tax evasion he can devise which are not contrary to a rule of law, yet did not involve the direct association of the court in the evasion.

or from share premium account is capital and not income,[25] and this applies both as between the tenant for life and the remainderman, and the recipient and the Revenue authorities.

Let us first consider Rule 6, that "bonus shares" do not attract income tax.

The history of this rule leads through some unfrequented by-ways in the doctrine of precedent. In *Blott's Case*, Lords Haldane, Finlay and Cave were opposed by Lords Dunedin and Sumner[26]; and since in their Lordships' House right dwells with the majority, victory lay with Lord Haldane and his supporters, and their decisions have since been law, including Lord Haldane's statement that: "It is by no means certain that the majority in such a general meeting would consist of persons liable to super-tax and assembling to devise a method of escaping it. Why, as a matter of law, if they were such, they should not attempt to escape it by any means that is not made unlawful I do not see." Five years later it was the dissentient Lord Sumner who led the House that reaffirmed and extended the rule in *Blott's Case* to mortgage stock in *I.R. Comrs.* v. *Fisher's Executors*, and he there spelled out the consequences of the majority decisions in *Blott's Case* with a meticulous precision, not to say an emphasis, that would seem to have been born less of conviction than of distaste.

This line of cases also throws some instructive sidelights on the use of fictions. Thus the majority in *Blott's Case* relied on the magic of "capitalisation"[27]; to this the dissentients objected[28]

[25] *Re Duff's Settlement* [1951] Ch. 923, C.A. At first instance Harman J. considered that the second rule laid down in *Hill* v. *Permanent Trustee Co. of New South Wales, Ltd.* must now be modified, as in the light of s. 58 it is no longer true to say that there is not any means other than a reduction of share capital of parting with money to shareholders except by way of dividing profits. The Court of Appeal, however, held that a distribution among shareholders of part of the share premium account must be treated as if the company were paying off paid-up share capital and specifically affirmed the Privy Council decision in *Hill* v. *Permanent Trustee Co.*, which after exerting for some years a considerable influence in the High Court now becomes legitimated by adoption in the English courts.

[26] The decision incidentally puts quite out of court those "realists" who contend that political prejudice dominates judicial decisions. There seems little reason to assume that Lord Sumner was less sympathetic to the aspirations of the super-tax payer than Lord Haldane or any of his brethren who agreed with him, and Lord Sumner explicitly rejected such a suggestion at [1921] 2 A.C. 207: "There is not the slightest evidence that liability to super-tax was ever thought of by anybody People who pay super-tax do not usually get much consideration from people who do not."

It might, however, be more colourably suggested that while Lord Haldane and his colleagues relied finally on the maxim that a taxing statute must be strictly construed, the unspoken premiss of Lords Dunedin and Sumner may have been that the law, even if enacted by a legislature untutored in the finesses of financiers, should be obeyed.

[27] At pp. 192, 196, 198–194, 200.

[28] Lord Dunedin said at p. 208: "I confess I am shy of the word 'Capitalise.' It seems to me to leave one in a hazy state of mind as to what is the legal operation which is so described." Lord Sumner, at p. 207: "To call it 'capitalisation' is neither here nor there, for, apart from the Companies Acts, profits may be capitalised in more ways than one."

as they did also to the continuous references to "the intention of the company", and to "bare machinery."[29] But in *Fisher's Case* Lord Sumner wove into his judgment (not, it is submitted, without a considerable undercurrent of scepticism) most of the fictions he had previously torn aside,[30] and in some of the later cases these assumed an even greater measure of unreality.[31]

From this point of view, the decision in *Blott's Case* appears unfortunate. Whilst it is undoubtedly desirable that legislation, and particularly taxing legislation, should be clear, that need not necessarily involve the conclusion that by calling the same thing by another name, or going through a slightly different set of motions, or substituting inactivity for activity,[32] manifest evasion of taxation should appear to be connived at by the courts. Too great a departure from standards of "reasonableness" in such matters surely involves the danger that the legislature, faced with the virtual impossibility of foreseeing all possible shifts of words and motions, and with wholesale tax evasion involving the necessity of laying a heavier burden on those (such as employed persons) for whom such shifts are not possible, may increasingly resort to the unbridled discretion of administrative officials. It would surely be a misfortune if "income" came eventually to mean "any advantage, in whatever form offered or received, which the Commissioners in their absolute discretion shall deem to be income," or some similar formula.

This, however, may be only the parsley. The meat of *Blott's Case* was that Rule 5, the rule established in *Bouch* v. *Sproule*

[29] Their "realist" approach is unmistakable. See, *e.g.*, at p. 212: "It takes two to make a paid-up share"; at p. 215: "Money, though it comes with a clog on it, is taxable, if and because it comes. How can mere nomenclature affect rights which depend on what has to be done in order to satisfy the law?"

[30] Particularly in the oft-quoted passage at p. 408: "Provided that the company violates no statute and also keeps within its articles, it can call the subject-matter of the distribution what it likes. . . . What the company says it is, that it is as against all the world. . . . How this is effected and by what resolutions, confirmations, and instruments, does not matter, for such things are 'bare machinery.' In what the company has said or done is found the answer to the question: What has the subject-matter of the distribution now become or ceased to be, when first it reaches the taxpayer. . . . Transmuted by this alchemy, profits in hard-earned gold become extra share-certificates, and yet the shareholders, who receive them, may be greatly the gainers."

[31] In *Whitmore* v. *I.R. Comrs.* (1925) 10 T.C. 645, at all material times all the ordinary shares were held by the director to whom the mortgage stock was issued; he and his wife held together over 86 per cent. of the preference shares, the balance being owned by members of his family: he presided at all meetings at which the transactions were discussed, but Rowlatt J. at p. 664 expanded on the intention of the company and concluded that it was irrelevant that "the company adopted this transaction, being a real transaction, and one which does not make the shareholder liable to super-tax, in lieu of another transaction which would have made him liable."

[32] As in *Higgs* v. *Olivier* [1951] 2 T.L.R. 998 (since confirmed by the Court of Appeal [1952] W.N. 80) in which it was held that payments received by a film actor for refraining from acting in films for a period were capital and not income, at least for the purposes of the Income Tax Act, 1918. This decision would seem to open another broad avenue of tax evasion.

between tenant for life and remainderman, was followed and extended to the tax field. *Bouch* v. *Sproule* had held that bonus shares issued by a company were not income but capital as between tenant for life and remainderman; *Blott's Case* established that they were equally capital and not income as between remainderman and the Revenue authorities. Lord Finlay, speaking of the decision in *Bouch* v. *Sproule*, said [33]: "The question whether it was income or capital could not be affected by the purpose which led to the institution of the inquiry. If it is income, it is liable to tax upon income: if it is capital it is not so liable. The liability follows from the nature of the property, and it seems impossible to me to say that the answer to the question whether it is income or not is to depend upon the purpose with which the question is asked."

This principle, however, and the harmony established between the trust and the tax cases (even though it was in fact a harmony only of negation) lasted for only seven years, when it was abruptly shattered by the Privy Council decision in *Hill's Case*,[34] which distinguished *Bouch* v. *Sproule* and held that any dividends paid in cash or extraneous shares, even if they represented capital profits, were income in the hands of a trustee shareholder and accrued for the benefit of the tenant for life. In so far as capital profits were concerned, this decision was plainly contrary to the established practice in tax cases (Rule 4).

The decision has recently leapt into some prominence as a result of the crop of cases, starting with *Re Sechiari*, resulting from the transaction under the Transport Act, 1947, by which the British Transport Commission acquired inter alia from Thomas Tilling Ltd. that firm's former interests in passenger road transport and road haulage undertakings, in consideration of an allotment of £24,800,000 worth of British Transport guaranteed stock at £101 per cent. The company then declared a capital profits dividend of £20,806,000 "payable out of the profit realised by the company" on this sale, and £20,806,000 worth of the British Transport stock was issued to the company's members in the proportion of £5 worth for every £1 of the company's stock. In three cases [35] it was held that the Transport stock was income belonging to the tenants for life of settled shares in Thomas Tilling Ltd., although the Stock Exchange quotation per £1 stock fell from £6.4.—cum dividend to £1.8.—ex dividend. Since the stock was distributed in payment of a capital profits dividend, there seems no doubt that, under rule (4), no income tax was payable upon it.

[33] at p. 197.

[34] See note 7, *supra*. *Re Bates*, at first instance, had preceded *Hill's Case* by two years, but it is perhaps true to say that it was *Hill's Case* that shook the profession, which had previously regarded the rule in *Bouch* v. *Sproule* as applicable.

[35] *Re Sechiari* [1950] 1 All E.R. 417; *Re Kleinwort's Settlement Trusts* [1951] Ch. 860; and *Re Rudd's Will Trusts* [1952] 1 All E.R. 254.

In *Bouch* v. *Sproule*, Lord Herschell said: [36] "The tenant for life is not intended to run away with a bonus that may have been accumulating for half a century." That, under the recent decisions, is precisely what he is permitted to do.

This line of decisions has also rather curious beginnings. *Hill's Case* was based on the authority of *Re Bates*, which was a clear case of capital profit.[37] The only authority cited for *Re Bates*, however, was the 1861 decision of *Maclaren* v. *Stainton*.[38] This, surely, is a somewhat shaky foundation for such a superstructure. Moreover, in *Bouch* v. *Sproule*, considerable emphasis was placed on the intention of the company to capitalise; in recent decisions no more attention has been given to the intention of the company in the trust cases than has been paid to the intention of the settlor. Clearly the intention of the company can hardly operate at all in an enforced sale of the kind involved in the Tilling cases. Nor, it is submitted, would a compulsory statutory successor normally be regarded as "another company."

Romer J.'s decision in *Re Sechiari*, which involved £20,000 worth of Transport stock, was given without prejudice to any question whether, in the circumstances of the execution of the trust, the court had or would exercise any jurisdiction to apportion the dividend on equitable principles between tenant for life and remainderman, and in *Re Kleinwort's Settlement*, which concerned £10,000 worth of the Transport stock, Vaisey J. considered this possibility more fully, but thought that the jurisdiction would be exercised only where the trustees had been guilty of a breach of trust. Although "the disparity between the amount of the original capital of the Tilling stock and the amount of the British Transport stock is certainly very striking," he did not consider it "such as by itself to justify the court's interference." In the later case of *Re Maclaren's Settlement Trusts*, in which, in the particular circumstances, Harman J. held that the Transport stock was capital, he also considered, though *obiter*, how far the court had power to declare that what *ex facie* is income is, in truth, capital, or vice versa. He was "inclined to agree" that the court's power to apportion was confined to cases of breach of trust, and he concluded: "As a matter of convenience, the practice in the ordinary case is that no apportionments are made, with the result that capital sometimes gets what, on a more exact scrutiny, would prove to be income and vice versa. *Where this produces a glaring*

[36] at p. 894.

[37] A company owning steam trawlers distributed a capital payment from profits realised by the sale of some trawlers at sums largely exceeding the values placed on them in the company's balance sheet.

[38] A company received, from the estate of its deceased manager and shareholder, a compromise payment of £220,000 in respect of debts due from him to the company, and distributed a bonus as a result, which was held to be a windfall, payable to the tenants for life.

Re Piercy [1907] 1 Ch. 289 was a decision to the same effect, but on rather peculiar facts.

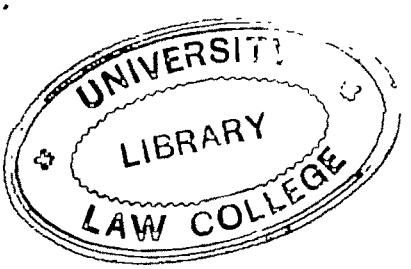
injustice, the court will cause a more exact calculation to be made, but it does not treat as income that which is capital, or as capital that which is income."

In the most recent case of *Re Rudd's Will Trusts*, involving £49,750 worth of Transport stock, an even stronger case for apportionment, on the basis of breach of trust, was put forward, but Upjohn J. again rejected it and declared the whole amount payable to the tenants for life.

If it is remarkable that the tenant for life should thus be able to run away with a "windfall" of £49,750 that may have been accumulating for half a century, it is surely astonishing that, simply because of this, he should not be liable for income tax; the sum that is so firmly income as between himself and the remainderman becomes equally firmly capital as between himself and the revenue authorities.

The position can hardly be considered satisfactory. The trust cases have moved far away from *Bouch* v. *Sproule* and, it is submitted, from the intention of the settlor; the tax cases have adopted a restrictive interpretation of taxing statutes and, whilst heavily stressing the freedom of persons and companies to evade taxation, have ignored taxing practice, which in its turn seems partly to be based on outworn theories. Both lines of authority have, since *Blott's Case*, shown a magnificent disregard of the other, and of the need for a comprehensive view of what the law considers income and what capital. The time seems more than ripe for a fresh assessment of the situation by a superior court.

O. M. Stone.[39]



[39] Miss Olive Stone, LL.B., B.Sc.(econ.), is an Assistant Lecturer in Law at the London School of Economics and Political Science.

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WRONGS AND REMEDIES IN ADMINISTRATIVE LAW

I

No aspect of English law lends itself less readily to traditional methods of exposition than the law relating to judicial review of administrative acts and decisions. Most of the reasons for this intractability are well known. Administrative law is not a homogeneous body of jurisprudence, but is rather an agglomeration of diverse and complex branches of law—liquor licensing, transport, social insurance, education, public health, housing, town and country planning, to mention only a few—and judicial review in each individual branch of administrative law has tended to develop in a distinctive manner. Thus, the standards of conduct that the courts have imposed on a Minister who is deciding whether to confirm a compulsory purchase order differ from the standards imposed on licensing justices. The difficulty of general exposition is increased by the variety of verbal formulas to be found in statutes conferring powers and duties upon administrative bodies. And in the process of interpretation a statutory formula literally applied by one judge may be read in an opposite sense by another judge, using another canon of interpretation, in a different context. Moreover, the terminology employed by the courts is often indeterminate. "Executive," "administrative," "ministerial," "legislative," "quasi-judicial," may be used to describe the same act or decision. The scope of review often depends upon whether a function is characterised as judicial or administrative; yet no consistently applied test for distinguishing between the two categories can be extracted from the English cases or from the multitudinous decisions in other common law jurisdictions.[1] To one who is attempting to expound the law of judicial review this may seem unfortunate. On the other hand, had the courts defined the terms uniformly for all purposes the effect upon the state of the law might have been still more unfortunate.

Faced with these formidable but intriguing problems, writers on administrative law have adopted two main methods of approach. The one has been to state certain broad general propositions and to support them with the citation of a small number of leading cases. This makes for an attractive simplicity, but is apt to leave an impression of over-simplification among those who have wrestled

[1] For valuable analyses of the confused state of the law in relation to this problem in Australia, see the articles of Geoffrey Sawer in (1948) 1 U. of W. Australia Annual Law Review 29; Zelman Cowen in (1948) 26 Can.B.R. 829; and F. R. Beasley in (1949) 27 Can.B.R. 686.

with the problems. When a distinguished private lawyer recently expressed the view that there was "too much flabbiness and too little toughness about many aspects of our public law,"[2] he may have had in mind the reluctance of public lawyers to come to grips with problems which are, unhappily, only too likely to tie them into knots. The other favourite method of approach has been to analyse not so much what the judges say as what they do, and in particular to expose the inadequacies of the conceptualistic approach to be found in the judgments. This approach to the problems of judicial review is, it is thought, valuable and necessary; but unless critical analysis is combined with constructive proposals and thorough exposition of the present law, such writings are unlikely to have much direct influence on legal development.

There is, however, one vital aspect of judicial review which can be examined historically and critically and which at the same time is suited to detailed analytical exposition. That aspect is the law relating to judicial remedies, of which the most important are certiorari, prohibition and mandamus. It is possible to trace with assurance their origins and development. The rules governing their availability can be extracted from the cases, or, where these are unsafe guides, from the basic principles that underlie the general practice of the courts. To prophesy the view that a court will take of the powers or duties of an administrative authority in a particular case must inevitably remain a hazardous undertaking; but there is no reason why it should be equally hard to say what is likely to be the appropriate method of challenging the conduct of that authority. Nevertheless doubts about the exact scope of the several remedies remain a source of uncertainty. Suits are lost because the wrong remedies have been chosen. And, what is in the long view a more serious matter, suits have been lost or won that might have been otherwise decided had the courts analysed the principles on which they were entitled to award the remedies sought.

Applications for certiorari, prohibition and mandamus must be made to a Divisional Court of the Queen's Bench Division. They concern a wide range of administrative bodies and also inferior courts of law. Cases cited to the Divisional Court tend to be confined to those directly related to the provisions of the statute before the court. Leading cases on the scope of the *remedy* that is being sought are too often overlooked because they were decided in a different legislative context. Judgment in the Divisional Court is seldom reserved. The result has been that contradictory decisions upon the scope of judicial remedies have been reached although the court has not appeared to be aware of any inconsistency. One object of the present article is to draw attention to some of the anomalies that impede rational exposition of the law, and, where possible, to suggest how they may best be removed.

[2] Sir David Hughes Parry in (1950) 28 Can.B.R. at 198.

II

DEVELOPMENT OF CERTIORARI

Perhaps the most important judicial remedies in administrative law are the two orders replacing the old prerogative writs of prohibition and certiorari. Today there appears to be no significant difference between the scope of the two orders, except that prohibition will not issue if there is nothing left to prohibit[3]; the discussion that follows is therefore limited to certiorari, apart from incidental references to prohibition.

From the last years of Henry III's reign until the end of the sixteenth century writs of certiorari issued for a great variety of purposes.[4] From 1600 onward we find reports of cases in which certiorari issued for a purpose relevant to the present inquiry: the King's Bench awarded certiorari to quash convictions made by justices out of sessions. Gradually it became settled that to move the King's Bench for a certiorari was the appropriate method of attacking orders and convictions by inferior courts for irregularity or want of jurisdiction, and by 1700, Holt C.J. was able to generalise in the broadest terms: "It is a consequence of all jurisdictions to have their proceedings returned here by certiorari. . . . Where any court is erected by statute, a certiorari lies to it."[5] In the *Cardiff Bridge Case*[6] (1700) it was held that the writ would issue to county justices in respect of their duties of fixing rates for the repair of bridges. For the whole of the eighteenth century and the early part of the nineteenth the business of local government in the counties was carried on under judicial forms by justices of the peace; and both as local administrators and as members of inferior courts of law they were subject to the supervisory control of the King's Bench, exercised primarily by means of the prerogative writs. Maitland has said that whatever the justices had to do was "the exercise of a jurisdiction."[7] There was as yet no question of distinguishing between "judicial" and "administrative" functions and of excluding from the province of certiorari and prohibition the latter class of functions. However, purely ministerial acts,[8] that is to say, formal administrative acts in the performance of which the justices were given no statutory

[3] It is sometimes said that prohibition (*a*) may lie to courts that are not "inferior" and (*b*) may lie to tribunals that have misconstrued statutes though without thereby exceeding their jurisdiction. Neither of these propositions is supported by sufficient authority.

[4] de Smith, "The Prerogative Writs" (1951) 11 Camb.L.J. 40 at 45–47.

[5] *Groenvelt* v. *Burwell*, 1 Ld.Raym. 454 at 459.

[6] *R.* v. *Inhabitants —— in Glamorganshire*, 1 Ld.Raym. 580.

[7] "The Shallows and Silences of Real Life," *Collected Papers*, 1, 478.

[8] Classification of functions as judicial, *administrative* and ministerial is a comparatively recent development. Until well into the nineteenth century all functions of courts and tribunals that were not purely ministerial were called judicial. When a distinction came to be drawn between judicial and administrative functions, the latter were often described, most confusingly, as ministerial.

discretion, lay beyond the reach of the two writs;[9] failure to perform a ministerial duty was a ground for the issue of a mandamus.

In the early nineteenth century it could be said that certiorari issued only to inferior *courts*, and that it was immaterial whether the members of the court were applying the criminal law, determining civil claims, or exercising discretionary governmental functions; all acts that were not purely ministerial were open to review in proceedings for certiorari. After 1882 a new phase opened in the history of certiorari. Elected local government authorities and *ad hoc* bodies with extensive powers over persons and property were set up to administer the expanding functions of government. In some cases duties formerly discharged by the justices were transferred to them. Parliament often provided a statutory appeal by way of certiorari from acts and decisions of these bodies.[10] It was natural that the courts should hold that common law certiorari would issue to the new bodies where Parliament had made no express provision for a method of challenge. Similarly, it was decided (though not without some hesitation) that acts of central government departments presided over by responsible Ministers were amenable to certiorari and prohibition. No longer was the availability of the writs limited to courts *stricto sensu*, or even to bodies closely resembling courts. Accordingly, the question whether the writs would issue in a particular case came to be determined by reference to the character of the act or decision that was impugned rather than by reference to the character of the body that had rendered it. That is the position that obtains today. Since, for various reasons, the courts have not been prepared to review every exercise of the functions of administrative authorities that effect private interests, they have sometimes refused to issue the writs on the ground that a function is not judicial but administrative.[11] Again, some functions have been held not to be open to review because they are legislative in character, or stages in legislative procedure.[12] But in general the courts have not been astute to find reasons why the writs should not issue

[9] In the exercise of their discretion the courts also refused to issue the writs to bring up certain "judicial" acts—*e.g.*, orders of the Commissioners of Sewers: *R. v. Commrs. of Sewers in Yorkshire*, 1 Str. 609—the removal of which might cause great inconvenience or hardship.

[10] *e.g.*, Poor Law Amendment Act, 1834; Municipal Corporations (General) Act, 1887, s. 44; Tithe Act, 1887, s. 3.

[11] See *Chabot v. Lord Morpeth* (1850) 15 Q.B. 446; *Re Grosvenor West-End Railway Terminus Hotel Co.* (1897) 76 L.T. 837; *Nakkuda Ali v. Jayaratne* [1951] A.C. 66; *R. v. Barry, ex p. Howe* [1950] 1 D.L.R. 284. At one time licensing functions were held not to be judicial: *R. v. Salford Overseers* (1852) 18 Q.B. 687; *R. v. Company of Watermen, etc.* [1897] 1 Q.B. 659; *R. v. Sharman* [1898] 1 Q.B. 578, but this view was later abandoned: *R. v. Woodhouse* [1906] 2 K.B. 501; *R. v. L.C.C.* [1931] 2 K.B. 215.

[12] *R. v. Hastings Local Board* (1865) 6 B. & S. 401; *Re Local Government Board* (1885) L.R.Ir. 150; see also *R. v. Legislative Committee of the Church Assembly* [1928] 1 K.B. 415.

when justice appears to require that the applicant should have a remedy,[13] and functions have been treated as judicial although, in a different context, they might have been characterised as administrative because of the wide statutory discretion conferred upon the public authority.[14]

III

SCOPE OF CERTIORARI

The courts have seldom refused to issue certiorari solely on the ground that an act or decision impugned is not judicial in character. But this is not to say that certiorari is an appropriate remedy whenever an administrative body errs in law or fact, or misapplies its discretionary powers. It will be shown that the scope of certiorari in relation to such bodies is not altogether clear.

Certiorari will go to inferior courts of law on any of the following grounds: (a) want of jurisdiction, which may arise through improper constitution of the court, or absence of essential preliminaries to the hearing, or express or implied exclusion of the subject-matter from its authorised province of adjudication; (b) excess of jurisdiction, through non-observance of essential procedural requirements during the hearing, or the delivery of a sentence or the making of an order unauthorised by law, or the giving of a wrong decision on a fundamental point that is "collateral to the merits" of the case; (c) abuse of jurisdiction, in so far as this refers to breach of the common law rules of natural justice; (d) ouster of jurisdiction, as where certain defences are raised that deprive the court of competence to continue with the hearing; (e) irregularity or error of law on the face of the record of the proceedings; (f) fraud or collusion in procuring the conviction or order.[14a] In proper cases, the order will issue on the same grounds to administrative bodies whose functions have been characterised as judicial. The courts have so held in recent cases where decisions of administrative tribunals have been attacked by certiorari.[15]

[13] *R.* v. *Local Government Board* (1882) 10 Q.B.D. 309 at 321; *R.* v. *Woodhouse* [1906] 2 K.B. 501 at 535; *R.* v. *Electricity Commissioners* [1924] 1 K.B. 171 at 206; *R.* v. *Minister of Health, ex p. Dore* [1927] 1 K.B. 765; *R.* v. *Postmaster-General, ex p. Carmichael* [1928] 1 K.B. 291; *R* v. *L.C.C.* [1931] 2 K.B. 215; *R.* v. *Hendon R.D.C., ex p. Chorley* [1933] 2 K.B. 696; *R.* v. *Boycott, ex p. Keasley* [1939] 1 K.B. 651. See also *R.* v. *Minister of Town and Country Planning* [1951] 1 K.B. 1, where certiorari was refused on the merits of the case but its appropriateness as a remedy not questioned. And see now *R.* v. *Manchester Legal Aid Committee, ex p. R. A. Brand & Co.*, [1952] 1 All E.R. 480.

[14] There is no English case in the present century in which the court has been satisfied that a body *has in fact exceeded* its jurisdiction and has yet refused to issue certiorari on the ground that the act in question is not judicial.

[14a] This list may not be wholly exhaustive: see *R.* v. *West Kent Quarter Sessions Appeal Committee, ex p. Files* [1951] 2 All E.R. 728 at 732.

[15] *R.* v. *Ludlow, ex p. Barnsley Corporation* [1947] K.B. 634; *R.* v. *Paddington & St. Marylebone Rent Tribunal, ex p. Kendal Hotels, Ltd.* [1947] 1 All E.R.

Certiorari will *not* go to inferior courts of law for errors of law not apparent on the record and not going to jurisdiction,[16] or for wrongful admission or rejection of evidence,[17] or for a decision contrary to the evidence or even for one unsupported by any evidence at all.[18] Here again, the courts have accepted, in cases where the question has been broached, that these rules also govern the issue of certiorari to bodies that are not courts.[19]

Superficially, then, the law appears simple and straightforward. Rules of common law enunciated for the purpose of judicial control over inferior courts have been applied for the purpose of judicial control over administrative bodies. But the design is more complex than it seems. Some administrative bodies that have been held to act "judicially" for the purpose of certiorari bear little resemblance to ordinary courts. They do not keep formal records; more than ordinary courts they exercise functions that are avowedly discretionary; even the procedure they follow in reaching their decisions may have little in common with that followed in the courts. As administrative bodies, they are said to be governed by the principles of the *ultra vires* doctrine. But in certiorari proceedings the main question that is commonly asked is whether they have exceeded (or acted without) jurisdiction. It seems to be universally assumed that to inquire whether a body has exceeded (or acted without) jurisdiction is necessarily to inquire whether it has acted *ultra vires*, because the difference between the two inquiries is purely verbal. That the two methods of inquiry usually produce the same answer can be conceded. Nevertheless, it is possible that in some cases they may produce different answers, because certain forms of abuse of powers, which may cause an administrative body to be regarded as having acted *ultra vires*, do not "go to jurisdiction." This curious problem does not often arise, and when it does arise the reviewing court can evade it by asking simply whether the body has acted in excess of its "legal

448; *R.* v. *Northumberland Compensation Appeal Tribunal, ex p. Shaw* [1951] 1 K.B. 711; [1952] 1 T.L.R. 161 (see also *John East Iron Works, Ltd.* v. *Labour Relations Board of Saskatchewan* [1949] 3 D.L.R. 51).

[16] *R.* v. *Weston-super-Mare, ex p. Barkers (Contractors), Ltd.* [1944] 1 All E.R. 747 is the best recent illustration.

[17] But see *R.* v. *West Riding of Yorkshire JJ., ex p. Broadbent* [1910] 2 K.B. 192; *cf.* also *R.* v. *Walton, ex p. Dutton* (1911) 75 J.P. 558.

[18] *R.* v. *Nat. Bell Liquors, Ltd.* [1922] 2 A.C. 128; *R.* v. *Cheshire JJ.* (1888) 8 Ad. & E. 998; *R.* v. *Bucks JJ.* (1848) 8 Q.B. 800; *Ex p. Hopwood* (1850) 15 Q.B. 121; *R.* v. *Shropshire JJ.* (1866) 14 L.T. 598; *R.* v. *Galway JJ.* [1906] 2 Ir.R. 446; *R.* v. *Mahoney* [1910] 2 Ir.R. 695; *Lexden and Munster Union Guardians* v. *Southgate* (1854) 10 Ex. 201 (prohibition).

[19] See *R.* v. *Minister of Health* [1939] 1 K.B. 232 and the *Barnsley Corporation* and *Kendal Hotels Cases* cited *supra*, note 15, in which a passage in *Halsbury*, 2nd ed., IX, 888, setting out these restrictive rules was approved and applied. But in *R.* v. *Salford Assessment Committee, ex p. Charles Ogden & Co.* (1948) 41 R. & I.T. 200 the Divisional Court issued certiorari to quash a decision of the committee on the ground that it was supported only by assertions based on hearsay. This is plainly inconsistent with the many decisions that show that want of evidence does not go to the jurisdiction of a tribunal. No relevant cases on this point were cited in the judgments.

authority."[20] It is, however, a problem that requires further examination.

IV

REVIEW IN TERMS OF JURISDICTIONAL DEFECTS

The characteristic attribute of a judicial act or decision is that it binds, whether right or wrong, reasonable or unreasonable; that is to say, it cannot be impeached in collateral proceedings[21] or by means of the orders replacing the prerogative writs, although, of course, it may be set aside on appeal. This proposition applies both to ordinary courts and to administrative bodies that are held to act in a judicial capacity,[22] but it is qualified by the rule that judicial error loses its impregnability if it relates to a jurisdictional point. A body that is acting in a judicial capacity has no power to err if the error causes it to assume a jurisdiction that was not entrusted to it.

As was said by Farwell L.J. in one case,[23] "it is a contradiction in terms to create a tribunal with limited jurisdiction and unlimited power to determine such limit at its own will and pleasure."[24] All bodies to which certiorari will issue are "tribunals" within the ambit of this principle. A distinction has been drawn between a decision on "the merits" and a decision on a "preliminary" or "collateral" matter,[25] *i.e.*, one that demarcates the limits of jurisdiction. Error in respect of "the merits" is unimpeachable; but it is otherwise with error on a preliminary or collateral matter, for a "wrong" decision (*i.e.*, one that is wrong in the opinion of the reviewing court[26]) on such a matter constitutes excess (or want) of jurisdiction. To distinguish between collateral and other matters may be logically impossible; no test has been consistently applied, and the decisions in relation to inferior courts *stricto sensu* reveal startling contradictions.[27] In applying the concept of limited jurisdiction to administrative bodies that have been held to act judicially for the purpose of amenability

[20] *cf. R.* v. *Electricity Commissioners* [1924] 1 K.B. 171 at 205.

[21] Except in certain special cases—*e.g.*, where a judgment has been procured by fraud; see *Halsbury*, 2nd ed., xix, 280 *et seq.*

[22] *Brittain* v. *Kinnaird* (1819) 1 Brod. & B. 432; *R.* v. *Bolton* (1841) 1 Q.B. 66; *Colonial Bank of Australasia* v. *Willan* (1874) L.R. 5 P.C. 417; *R.* (*Wexford C.C.*) v. *Local Government Board* [1902] 2 Ir.R. 349 at 378; *R.* (*Waterford Corporation*) v. *Local Government Board* [1922] 2 Ir.R. 76 at 93.

[23] *R.* v. *Shoreditch Assessment Committee* [1910] 2 K.B. 859 at 880.

[24] But Parliament may, by apt words, make a tribunal sole judge of the limits of its jurisdiction: see Lord Esher M.R.'s much-quoted words in *R.* v. *Special Commissioners of Income Tax* (1881) 21 Q.B.D. 313 at 319.

[25] *Bunbury* v. *Fuller* (1853) 9 Ex. 111 at 140.

[26] But where the disputed decision on the jurisdictional issue turns on a point of fact only, the courts are slow to interfere with the decision of the tribunal: see *R.* v. *Fulham, etc., Rent Tribunal, ex p. Zerek* [1951] 2 K.B. 1 at 11–14 and authorities there cited.

[27] See D. M. Gordon's brilliant analysis in "The Relation of Facts to Jurisdiction" (1929) 47 L.Q.R. 459, and especially the cases he cites at 479–482.

to certiorari, the courts have shown less vacillation. In the great majority of cases where such a body has been alleged to have exceeded its powers and where certiorari has been sought, the courts have held (or, more often, tacitly assumed) that the allegation of error concerned a collateral, jurisdictional issue [28] and was therefore open to examination.

The elasticity of the concept may be illustrated by cases in the law of liquor licensing. Licensing justices, although regarded as acting judicially in that they are subject to certiorari, are to be regarded as an administrative body rather than a court.[29] Under section 57 of the Licensing (Consolidation) Act, 1910, they are empowered to grant exemption from normal closing hours on "special occasions." The courts have assumed that they are entitled to review in certiorari proceedings a decision as to what are special occasions, and have held that the term does not include weekly market days [30] or the whole period of summer time.[31] By treating the question as if it were "collateral to the merits," the courts have reached the same result as if the question had come before the courts on appeal by way of case stated.

Another group of cases carries the scope of judicial review still further. Section 1 (1) of the Licensing Act, 1921, gives the justices power to alter the permitted hours of opening on weekdays if it is shown to their satisfaction that the "special requirements" of the district render it desirable. The courts have taken the view that the question whether special requirements of the district render this desirable is primarily one for the justices, but that if there is no evidence that special requirements exist the justices will exceed their jurisdiction and certiorari will go to them.[32] This view may seem to involve a partial abrogation of judicial review; but that would be a superficial interpretation, for (i) it is impossible to see how a decision that special requirements existed is in any way "collateral to the merits"; rather is it the heart of the issue that the justices are required to decide,[33] and (ii) even assuming that the

[28] See, however, *R.* v. *St. Olave's Board of Works* (1857) 8 E. & B. 533; *R.* v. *Woodhouse* [1906] 2 K.B. 501 at 515–516; *R.* v. *Cheshire JJ., ex p. Heaver* (1918) 108 L.T. 374; *R.* v. *Minister of Health* [1939] 1 K.B. 232; *R.* v. *Minister of Health* [1942] 1 All E.R. 81, 551; *Tithe Redemption Commrs.* v. *Wynne* [1943] K.B. 752 (discussed by D. M. Gordon in an article (1944) 60 L.Q.R. 250); *R.* (*Waterford Corporation*) v. *Local Government Board* [1922] 2 Ir.R 76

[29] *Boulter* v. *Kent JJ.* [1897] A.C. 556; *Attwood* v. *Chapman* [1914] 3 K.B. 275.

[30] *R.* v. *Butt, ex p. Brooks* (1922) 88 T.L.R. 537.

[31] *R.* v. *Sussex JJ., ex p. Bubb* [1933] 2 K.B 707 See also *R.* v. *Lancs JJ., ex p. Commrs. of Customs and Excise* (1934) 151 L.T. 376; *R.* v. *Inglis, ex p. Cole-Hamilton* (1921) 90 L.J.K.B. 770; and, in a slightly different context, *R.* v. *Johnson* [1905] 2 K.B. 59.

[32] *R.* v. *Wisbech Licensing JJ., ex p. Payne* [1937] 2 K.B. 706; *R* v. *Bradford Licensing JJ., ex p. Illingworth* [1938] 4 All E.R. 48 (affirmed [1939] 3 All E.R. 106).

[33] *cf. R.* v. *Lincolnshire JJ., ex p. Brett* [1926] 2 K.B. 192 at 202–203. And see notes 18 and 19, *supra*, for the difference between want of jurisdiction and want of evidence to support a decision.

question is a collateral one, Parliament appears to have made the justices sole judges of the existence of such requirements.[34]

* * * * *

It might perhaps have been thought that the errors of administrative bodies would often have been beyond challenge in certiorari proceedings, because for the purpose of such proceedings they must be deemed to have acted in a judicial capacity and judicial error is in certain circumstances unimpeachable. But in practice the scope of review exercised by the courts has been wide, in consequence of a liberal application of the concept of limited jurisdiction. In none of the cases that have been mentioned was the scope of review in any way affected by the fact that the matter came before the courts in certiorari proceedings. If the action of the bodies concerned had been impugned in other proceedings, and if the courts, instead of treating the bodies as "judicial" bodies exercising a "jurisdiction," had treated them as "administrative" and had inquired whether they were acting *ultra vires*, it is safe to say that in every case[35] the decision of the court would have been the same. Review in terms of jurisdiction and review in terms of *vires* would lead to the same conclusion. If, then, the two methods of review are liable to lead to different conclusions, the problem does not arise in the type of case that has been considered in this section.

V

CERTIORARI, MANDAMUS AND ABUSE OF DISCRETIONARY POWERS

The problems considered up to this point have centred mainly around judicial review of orders that have been based on administrative findings of law or fact. To differentiate rigidly between findings of law or fact and "purely discretionary" functions is often unrealistic. Where the making of a valid order is dependent on a finding that has to be related to a vague statutory standard (*e.g.*, that a house is "unfit for human habitation," that "special requirements" exist in a district, that there are "reasonable grounds" for believing a person to be unfit to hold a licence), the measure of discretion involved in the administrative finding may be very large. But it is usually possible to draw an acceptable distinction between matters of law and fact, on the one hand, and matters of discretion, on the other; and in laying down general principles of judicial review the courts have, on the whole, acted on the assumption that the quantitative distinction between the two classes of matters can be analysed in qualitative terms.

Discretionary administrative powers are classified as qualified and absolute. Qualified administrative powers must be exercised with a "judicial discretion," that is, exercised not arbitrarily or

[34] *cf. R. v. Special Commissioners of Income Tax*, note 24, *supra*.
[35] Including those cited at note 28; *supra*.

capriciously but in accordance with certain standards of propriety.[36] This means in practice that the authority invested with the power must genuinely put its mind to the matter, must act in good faith, must have regard to relevant considerations and disregard the irrelevant, must not use its power for unauthorised purposes, and must not act with gross unreasonableness.[37] These several rules, which "overlap to a very great extent,"[38] are commonly regarded as aspects of the *ultra vires* doctrine.[39] An administrative body which disobeys the rules acts *ultra vires*. Absolute discretionary powers are usually found not to be literally "absolute," for they must not be used for unauthorised purposes; but they are distinguishable from qualified discretions in that the considerations to which the authority may have regard are almost unlimited and in that the question of unreasonableness is wholly merged with that of good faith.[40]

How may abuses of discretionary powers be challenged in the courts? Parliament sometimes gives a right of appeal to the ordinary courts from a decision of an administrative body. Normally the right of appeal is expressly limited to questions of law, but the courts have in some cases construed statutes as entitling them, in the exercise of their appellate jurisdiction, to review even the reasonableness or expediency of the manner in which an administrative body has exercised its discretion.[41] Again, questions of abuse of discretion may be raised where Parliament has given parties aggrieved by housing and town planning orders the right to make an application to the courts to have them set aside on the ground that they are not within the powers conferred by the enabling Act.[42] They may also be raised in an action for a declaration,[43] or in civil actions for damages or an injunction, or in criminal proceedings. But perhaps the most frequently used method of raising such questions is by proceedings on the Crown side for certiorari and mandamus. Yet the extent to which certiorari is appropriate for this purpose is open to doubt, and

[36] *Rooke's Case*, 5 Co.Rep. 99; *Keighley's Case*, 10 Co.Rep. 139; *Sharp v. Wakefield* [1891] A.C. 173; Robson, *Justice and Administrative Law*, 3rd ed., 399 *et seq.*

[37] The principle that authorities whose functions are characterised as "judicial" must also comply with the rules of natural justice is not discussed in this article. See articles by de Smith in (1948) 11 M.L.R. 306 and H. W. R. Wade in (1949) 10 Camb L.J. 216 on this problem.

[38] *Associated Provincial Picture Houses, Ltd.* v. *Wednesbury Corporation* [1948] 1 K.B. 223 at 229.

[39] *e.g.*, in *Short* v. *Poole Corporation* [1926] Ch. 66 at 90.

[40] A discretionary power will be literally absolute if the enabling Act expressly and unambiguously prohibits judicial review of its exercise; see, *e.g.*, British Nationality Act, 1948, s. 26.

[41] See, in different contexts, *Croydon Corporation* v. *Thomas* [1947] K.B 386; *Middlesex C.C.* v. *Miller* [1948] 1 K.B. 433; *Stepney B.C.* v. *Joffe* [1949] 1 K.B. 599; *Parkstone Primrose Laundry* v. *Poole Corporation* (1950) 114 J.P. 354. *Cf.* also *Pilling* v. *Abergele U.D.C.* [1950] 1 K.B. 636.

[42] As in *Earl Fitzwilliam's Wentworth Estates Co.* v. *Minister of Town and Country Planning* [1951] 2 K.B. 284.

[43] As in the *Wednesbury Case* [1948] 1 K.B. 223.

the appropriateness of mandamus has been established only by virtue of some strange decisions by the courts.

(a) *Certiorari*

Certiorari will issue to quash an order made by an administrative body only if the functions of that body are characterised as being at least partly judicial. Those who insist that a clear-cut distinction exists between judicial and administrative functions have argued that certiorari is appropriate to review judicial error only.[44] They regard administrative acts (by which they mean exercises of discretionary powers that are not governed by statutorily prescribed standards) as being inherently arbitrary and therefore outside the province of judicial review. This view, however, has not commended itself to the courts.[45] Certiorari has issued in respect of certain forms of abuse of "administrative" discretions by bodies whose general functions have been characterised as judicial. The question to be discussed is, when is certiorari the appropriate remedy in such cases? This problem has seldom been squarely faced, and never adequately discussed, in the reported cases. The propositions set out below are therefore no more than tentative solutions to the difficulties that arise.

(1) Where the administrative body uses its powers ostensibly for the purpose for which they were granted but in reality for a wholly unauthorised purpose, certiorari may properly issue to quash its act or decision.[46] Whether or not the body intended to misapply its powers is immaterial. It is also probably immaterial whether Parliament has defined the permitted purposes expressly or by implication.[47]

So to act is to act *ultra vires*, or, to use the language appropriate to certiorari cases, in excess of jurisdiction. A possible analogy is the case of a tribunal which is under a *duty* to decide a point of dispute submitted to it, but which fails to address itself to this point and exceeds its jurisdiction by giving a ruling on a wholly extraneous point.[48]

(2) Where the administrative body makes an order which shows *on its face* that irrelevant considerations have been taken into account or that relevant considerations have been disregarded in the exercise of its discretion, certiorari may properly issue to quash the order.

[44] Notably D. M. Gordon in "'Administrative' Tribunals and the Courts" (1933) 49 L.Q.R. 94.

[45] See, *e.g.*, *R.* v. *L.C.C.* [1931] 2 K.B. 215; and *cf.* Gordon's criticisms in (1932) 10 Can.B.R. 198.

[46] *R.* (*Wexford C.C.*) v. *Local Government Board* [1902] 2 Ir.R. 349; *R.* v. *Minister of Health, ex p. Davis* [1929] 1 K.B. 619 (prohibition).

[47] See the *Bell Rent Tribunal Case* ("Block Reference Case") [1949] 1 K.B. 666, though the decision is open to criticism in certain respects. *Cf.* also *R.* v. *Brighton Corporation, ex p. Shoosmith* (1907) 96 L.T. 782; this, however, was a case of statutory certiorari, not common law certiorari.

[48] *Board of Education* v. *Rice* [1911] A.C. 179.

This situation may arise where a planning authority refuses a property owner permission to develop his land, giving reasons which it is expressly or impliedly precluded from taking into account [49]; or where a licensing authority grants a licence subject to conditions which it has no power to impose.[50] Such orders may properly be dealt with by the courts, in accordance with the general principle that an order that exhibits an error of law on its face can be quashed by certiorari.[51]

(8) Where the administrative body has, in exercising its discretion, taken irrelevant matters into account or disregarded relevant matters or come to a grossly unreasonable decision, *but has not made an order that exhibits these defects on its face*, it is very doubtful whether certiorari will issue to it, unless (*semble*) the abuse of powers is tantamount to an attempt to use them to effect an entirely different purpose from that for which they were conferred.[52]

This proposition is supported by authorities of respectable antiquity. Thus, it was held in the eighteenth century that certiorari would lie to quash rates fixed by justices if they were inequitably assessed, but only if the faulty basis of assessment was apparent on the face of the order.[53] More recently the Divisional Court has held that the same general principle governs the review of decisions by administrative tribunals. In the *Kendal Hotels Case* [54] landlords applied for certiorari to quash a decision of a rent tribunal on the grounds that the tribunal had fixed the rent without having taken relevant considerations into account and at an arbitrarily low figure. The Divisional Court dismissed the application, holding that any errors committed by the tribunal did not go to its jurisdiction. There was no question of the order being bad on its face. The Lord Chief Justice, delivering the leading judgment, compared the application with one for certiorari to quash the order of a court for latent error of substantive law not going to jurisdiction, or for error as to the admissibility of evidence or the weight of evidence.[55]

In short, to exercise a discretion irrelevantly or unreasonably is not to "exceed jurisdiction." If the misapplication of powers

[49] *R.* v. *East Kesteven R.D.C.* [1947] 1 All E.R. 810, where the court held that the discretion had been properly exercised but apparently assumed that certiorari could properly have issued if it had been abused.

[50] *R.* v. *L.C.C.* [1931] 2 K.B. 215; *R.* v. *Minister of Transport, ex p. Upminster Services, Ltd.* [1934] 1 K.B. 277. In both cases orders were quashed although the licensing authority had power to make such order as it thought fit.

[51] *R.* v. *Northumberland Compensation Appeal Tribunal, ex p. Shaw* [1952] 1 T.L.R. 161.

[52] As in proposition (1), *supra*.

[53] *R.* v. *Mast* (1795) 6 T.R. 154 at 156; *R.* v. *Salop JJ.*, Sess.Cas. 78. *Cf.* note, p. 218, *infra*.

[54] *R.* v. *Paddington & St. Marylebone Rent Tribunal, ex p. Kendal Hotels, Ltd.* [1947] 1 All E.R. 448. See also *R.* v. *Brighton & Area Rent Tribunal, ex p. Marine Parade Estates* (1936), *Ltd.* [1950] 2 K.B. 410.

[55] Quoting the well-known passage in *Halsbury*, 2nd ed., IX, 888; see also note 19, *supra*.

can be seen merely by looking at the order made by the administrative body, certiorari will issue, not because there has been excess of jurisdiction but because there is, in effect, error of law on the face of the "record." Just as, in the case of courts *stricto sensu*, affidavit evidence is not admitted to show latent error of law or fact unless the error goes to the jurisdiction of the court, so in the case of administrative bodies such evidence should not be admitted to show that the body has exercised its discretion irrelevantly or unreasonably, because such errors are not jurisdictional errors. To classify them as jurisdictional would be to stretch the elastic concept of jurisdiction beyond breaking-point.

It is at this point that difficulties arise. One of the principles of the *ultra vires* doctrine is that administrative bodies which exercise discretionary powers arbitrarily or on irrelevant grounds act *ultra vires*. But, as has been indicated, such a misapplication of powers does not ordinarily affect *jurisdiction*; and in certiorari proceedings it is usual to review the conduct of these bodies in terms of jurisdiction. A case may therefore occur where in certiorari proceedings the courts will hold an order to be unimpeachable because it is within the jurisdiction of the body making it, although on the same facts in another form of proceeding they might hold that the body has, by abusing its powers, acted *ultra vires*. It is not suggested that the *Kendal Hotels Case* (*supra*) is an example of this type of case. Rent tribunals have been left free to evolve their own standards for the purpose of determining reasonable rents. "Parliament has chosen to make them the absolute masters of the situation and to leave the decision of these cases to them without appeal."[56] Accordingly, the courts regard them as having legal power to take a very wide range of considerations into account and even, in certain circumstances, to err in the construction of the relevant legislation. But problems may well arise where, *e.g.*, another type of tribunal, the scope of whose discretion is more narrowly defined, is shown, in certiorari proceedings, to have taken improper factors into account.

Those who have formed the opinion that the problem expounded above is a figment of the writer's imagination may draw sustenance from other cases which indicate that the principles laid down in the *Kendal Hotels Case* as to the limitations of certiorari are not settled law. Thus certiorari has issued to quash a decision by a licensing authority not to renew an on-licence, its refusal having been determined by the irrelevant criteria of how much the licensee was prepared to pay to a compensation fund and how many other licences he was prepared to surrender.[57] Affidavit evidence was

[56] *Kendal Hotels Case* [1947] 1 All E.R. 448 at 450.

[57] *R. v. Shann* [1910] 2 K.B. 418. See also *R. v. Minister of Transport, ex p. H.C. Motor Works, Ltd.* [1927] 2 K.B. 401, where, however, certiorari was refused on the merits; and also dicta in *R. v. Board of Education* [1910] 2 K.B. 165 at 175 *et seq.*

admitted to show the grounds of refusal. Again, affidavits have been admited, and prohibition and certiorari issued, in cases where authorities entrusted with substantially discretionary powers have been held to have "exceeded their jurisdiction" by applying "wrong tests" in exercising them.[58] A decision of the Divisional Court in 1948[59] calls for some comment, coming as it did so soon after the *Kendal Hotels Case*. It concerned the functions of county court registrars under the Workmen's Compensation Act, 1925. Workmen who had contracted pneumoconiosis in the course of their employment agreed with the National Coal Board to accept lump sums of £400 in settlement of their claims for compensation. Under the Act the registrar, before recording the memoranda of agreement, had to satisfy himself that the sums agreed upon were adequate; but here, so it was shown by affidavits, he recorded them without considering the adequacy of the £400 in the individual cases, on the grounds that the parties were satisfied and that this was the largest sum the Board would pay to claimants. The court held that the registrar had erred in treating these factors as conclusive, and that since he had failed to take into account the question of adequacy certiorari would go to quash the recording of the memoranda. Yet if it was the right remedy,[59a] then not only were the principles laid down by the Divisional Court in the *Kendal Hotels Case* a few months earlier too narrow, but the old decisions on the scope of certiorari have imperceptibly faded away and the union between certiorari and the concept of jurisdiction has ended in an unpublicised divorce.[60]

* * * * *

If, as has been suggested, certiorari may be of limited efficacy for the purpose of attacking the exercise of administrative discretions, the question arises, what other remedies, other than statutory remedies, are suitable for this purpose? One is the action for a declaration. The High Court of Australia has ruled[61] that the validity of a decision by an administrative tribunal cannot be questioned by this method where certiorari or prohibition would be appropriate. But even if this case is followed in England, this method will remain available to question a decision on the grounds of irrelevancy or arbitrariness, for, as we have seen, these defects do not go to jurisdiction and unless patent on the record probably

[58] *Estates & Trust Agencies* (1927), *Ltd.* v. *Singapore Improvement Trust* [1937] A.C. 898; *R.* v. *Connell, ex p. Hetton Bellbird Collieries, Ltd.* (1944) 69 C.L.R. 407.

[59] *R.* v. *Registrar of Pontypridd County Court* [1948] 1 All E.R. 218.

[59a] In addition to certiorari to quash, mandamus issued to order the registrar to hear the matter again. On the authorities, mandamus may be regarded as an appropriate remedy; but the judgment of the court was concerned with the question whether certiorari ought to issue to quash what had already been done.

[60] *cf.* the strange decision of the Divisional Court in the *Salford Assessment Committee Case* (1948), criticised note 19, *supra*.

[61] *Toowoomba Foundry Pty., Ltd.* v. *Commonwealth* (1945) 71 C.L.R. 545, distinguishing *Cooper* v. *Wilson* [1937] 2 K.B. 361 on this point.

lie beyond the reach of certiorari. In fact, however, the action for a declaration has been used surprisingly little for this purpose.[62] No doubt this is because it has not been regarded as having a wider scope than certiorari. Also, a declaratory judgment has no coercive effect, and this may be a disadvantage to one who wishes the court to quash an order or to compel the exercise of a sound discretion. A more popular remedy where discretionary powers have been abused has been the order of mandamus.

* * * * *

(b) *Mandamus* [63]

By a singular feat of judicial law-making, a remedy devised to restore persons to public offices from which they had been illegally excluded has been converted into a comprehensive remedy for controlling the exercise of administrative discretions.

Mandamus issues to secure the performance of a public duty. An authority entrusted with discretionary powers cannot be ordered to exercise them in any particular way, but if it has a duty to exercise a discretion and omits to do so then mandamus will go to order it to address itself to the matter. Similarly, an inferior court or a tribunal cannot be ordered how to exercise its jurisdiction, but if it refuses to adjudicate at all upon a case properly before it then it can be compelled to do so. In short, mandamus is an appropriate remedy where a public body has refused, in terms or in effect, to perform a ministerial duty,[64] including a ministerial duty to exercise a discretion, or where a court or tribunal has wrongfully declined to perform a duty to adjudicate.

A court or tribunal may wrongfully decline jurisdiction by deciding incorrectly on a preliminary or "collateral" point that it has no power to adjudicate. The reviewing court will be slow to interfere if the decision on the jurisdictional point turned upon a question of fact. As upon applications for certiorari and prohibition on the grounds of excess of jurisdiction, considerable difficulty is often encountered in distinguishing between a decision upon a preliminary or collateral point, which is open to review, and a decision upon the "merits," which is not.[65] Again, a court or administrative tribunal may decline jurisdiction, or decline to exercise its discretion, as the case may be, by failing to decide the case before it and instead deciding a point not before it [66]; or by using a power colourably in order to effect an entirely unauthorised

[62] The *Wednesbury Case* [1948] 1 K.B. 223 is one of the few instances.

[63] The conditions under which mandamus will issue will not be fully summarised here. For observations on its early history, see de Smith (1951) 11 Camb.L.J. at 50 *et seq.*

[64] To agree to perform an absolute duty only if conditions are complied with by others is to refuse to perform it: *R.* v. *Tynemouth R.D.C.* [1896] 2 Q.B. 219, 451; *R.* v. *Lancaster (Inhabitants)* (1900) 64 J.P. 280.

[65] See, *e.g.*, *R.* v. *Licensing Authority for Goods Vehicles for the Metropolitan Traffic Area, ex p. B. E. Barrett, Ltd.* [1949] 2 K.B. 17.

[66] *Board of Education* v. *Rice* [1911] A.C. 179. Certiorari issues to quash the decision given.

purpose [67]; or by acting under the dictation of another body [68]; or by improperly delegating its power of decision to another body [69]; or by deciding applications before it by reference to a predetermined rule of policy without considering the merits of individual cases.[70]

These are all genuine illustrations of failure to perform a duty to decide. But a number of other cases go farther, in that mandamus has issued to bodies which have in fact exercised their jurisdiction or discretionary powers but which have exercised them improperly. They are based upon the fiction that a body that has exercised its powers arbitrarily or on irrelevant grounds has not exercised them at all. Dicta in some old cases indicate that persons endowed with discretionary powers are deemed not to have exercised them if they have acted capriciously [71] or with corrupt motives.[72] In the leading case of *R.* v. *Adamson* [73] the law was placed on its present footing. The court ordered mandamus to go to justices who had refused to issue summonses for conspiracy against persons who were alleged to have broken up a public meeting on the *Tichborne Case*. It was held that "the magistrates must have acted upon a consideration of something extraneous and extrajudicial, which ought not to have affected their decision [namely, their distaste for the views expressed at the meeting], and which . . . was *the same as declining jurisdiction.*" [74] This idea can be formulated without introducing the concept of jurisdiction. As was said by Lord Esher M.R. in another much-quoted passage [75]: "If people who have to exercise a public duty by exercising their discretion take into account matters which the courts consider not to be proper for the guidance of their discretion, then in the eye of the law they have not exercised their discretion." In order to justify the issue of mandamus, the courts have disregarded the principle that the existence of jurisdiction does not depend on regularity of its exercise, and have equated abuse of discretion with its non-user. The reports contain dozens of cases, most of them in the field of licensing law, in which mandamus has issued to order a tribunal to hear and determine an application which it had already considered but had refused on irrelevant grounds. Some cases appear to go further, in that mandamus has issued to a tribunal to hear and determine when it had in fact *granted* the

[67] *R.* v. *Lord Leigh* [1897] 1 Q.B. 132.
[68] *Ex p. Duncan* (1904) 4 S.R. (N.S.W.) 217; see also *R.* v. *Stepney Corporation* [1902] 1 K.B. 317.
[69] *R.* v. *Burnley JJ.* (1916) 32 T.L.R. 695.
[70] Authorities are reviewed in *R.* v. *P.L.A., ex p. Kynoch, Ltd.* [1919] 1 K.B. 176 and *R.* v. *Torquay Licensing JJ., ex p. Brookman* [1951] 2 K.B. 784; see note (1952) 15 M.L.R. 78.
[71] *R.* v. *Archbishop of Canterbury* (1812) 15 East 117 at 135–136, 139.
[72] *R.* v. *Governors of Darlington Free Grammar School* (1848) 12 L.J.Q.B. 124 at 128.
[73] (1875) 1 Q.B.D. 201; *cf. R.* v. *Boteler* (1864) 33 L.J.M.C. 101.
[74] 1 Q.B.D. at 205; see also *R.* v. *Board of Education* [1910] 2 K.B. 165 at 179.
[75] *R.* v. *Vestry of St. Pancras* (1890) 24 Q.B.D. 371 at 375.

application before it but had qualified its approval by imposing conditions that showed it had taken irrelevant factors into account and had misconstrued the scope of its powers.[76] These latter decisions have been criticised on the ground that there the tribunals had obviously not declined jurisdiction but had exercised it wrongly. But they are no more anomalous than those in which tribunals have been held to decline jurisdiction by refusing applications on improper grounds. In neither class of case did the tribunal decline jurisdiction. There is no declining of jurisdiction unless a tribunal has refused an application before it on the ground that, whatever may be the merits of the application, it has no power to grant what has been asked for, or unless it has "in substance shut its ears to the application which was made to it, and has determined upon an application which was not made to it."[77]

A tribunal that has decided a case by reference to extraneous considerations is often said to have declined jurisdiction through having failed to "hear and determine according to law." Failure to hear and determine according to law is supposed to mean something more than error in the exercise of jurisdiction,[78] which is not a ground for mandamus; but it has been held to include the "refusal of true jurisdiction" by the commission of flagrant errors in applying the relevant statute law to the facts of the case, for in such cases the tribunal "must have been guided by extraneous considerations" or "must have misunderstood the nature of the jurisdiction entrusted to it" and therefore "constructively declined jurisdiction."[79] Mandamus has thus been used not merely as a method of controlling the exercise of discretionary powers, but also, in some cases, as a method of indirectly overruling findings of law and fact.

The concept of constructive declining of jurisdiction, allied with the still vaguer concept of failure to hear and determine according to law, might have been used to enable mandamus to cover all the ground occupied by certiorari and the appeal by way of case stated and so render these remedies superfluous. However, the courts have drawn a line beyond which mandamus will not extend. For example, it will not issue, except in combination with certiorari, to a body that has wrongfully assumed and then exercised jurisdiction over a matter outside its competence[80]; or to order a rehearing by a tribunal where the previous hearing was vitiated by

[76] *R.* v. *Bowman* [1898] 1 Q.B. 663; *R.* v. *Dodds* [1905] 2 K.B. 40; *R.* v. *Shann* [1910] 2 K.B. 418; *R.* v. *Wandsworth Licensing JJ.* [1921] 3 K.B. 487.

[77] *R.* v. *P.L.A., ex p Kynoch, Ltd.* [1919] 1 K.B. 176 at 183.

[78] *R.* v. *Cotham* [1898] 1 Q.B. 802 at 806; *R.* v. *P.L.A., supra*; *R.* v. *War Pensions Entitlement Appeal Tribunal* (1933) 50 C.L.R. 228 at 242–248.

[79] *R.* v. *de Rutzen* (1875) 1 Q.B.D. 55; *R.* v. *Vestry of St. Pancras, supra*; *R.* v. *Cotham, supra*; *Ex p. Hebburn, Ltd., re Kearsley Shire Council* (1947) 47 S.R. (N.S.W.) 416 at 420.

[80] *R.* v. *Nicholson* [1899] 2 Q.B. 455.

the interest of its members.[81] Whether mandamus may properly issue without a certiorari to a tribunal that has infringed the *audi alteram partem* rule of natural justice by failing to give both sides a hearing is doubtful, but the point is purely academic because certiorari is always appropriate for this purpose.[82]

VI

Three main conclusions emerge from this study : that the reasoning used in applying the main judicial remedies is often tortuous and artificial, that the courts have given apparently contradictory decisions on points of difficulty, and that certiorari is not a wholly satisfactory remedy in administrative law. This is not to deny that the adaptation of the prerogative writs to the function of correcting abuses in the administrative process has been a major achievement of the English courts of common law. It is significant that the same remedies have been used for the same ends and are governed in their scope by substantially the same rules in the common law jurisdictions throughout the Commonwealth, in the Republic of Ireland, and also, with minor variations, in the United States. They are also employed in the laws of Ceylon and Quebec; and in Scotland and South Africa, although the remedies differ, the substantive rules governing the scope of judicial review are fundamentally similar.

The cumbrousness of certiorari is explained by its historical association with courts and with the concept of jurisdiction. It issues only to inferior courts and other bodies that exercise judicial functions; it is primarily a remedy for excess of jurisdiction. In order that it may be used to quash acts and decisions of administrative bodies they must be characterised as judicial or quasi-judicial bodies and the inquiry into the legality of their acts and decisions is usually conducted in the language of jurisdiction. If the disadvantages of certiorari were confined to the matter of clumsy terminology they could be suffered with equanimity, but in fact they go further. The concepts in which certiorari is rooted may be admirable for the supervision of ordinary courts, but they are not always adequate for the supervision of administrative bodies.

If an administrative body commits an error of law or fact in performing its functions, or misuses a discretionary power by acting arbitrarily or on irrelevant grounds, it may be held to have acted *ultra vires*. But if its conduct is impugned by certiorari it follows that (a) the body must be treated as judicial, and judicial error cannot normally be traversed unless it concerns a collateral or

[81] *R. v. Kent JJ.* (1880) 44 J.P. 298. *R. v. L.C.C., ex p. Akkersdyk* [1892] 1 Q.B 190, which contradicts this rule, was decided at a period when it was thought that licensing bodies were not amenable to certiorari; it is an anomalous decision on the scope of mandamus.

[82] It is difficult to imagine why the appropriateness of certiorari was questioned in the recent *Brighton Area Rent Tribunal Case* [1950] 2 K B. 410 at 417.

preliminary matter; and (b) what is material is whether or not the body has exceeded jurisdiction, and abuse of discretion does not usually touch jurisdiction. In practice most errors of law and fact by administrative bodies have been assumed in certiorari proceedings to relate to collateral matters and have thus been made amenable to review. To this extent, therefore, reviewing the conduct of administrative bodies in the light of jurisdictional standards has not restricted the sphere of judicial control, although it has caused inapposite language and questionable reasoning to be used in the judgments. But what is unsatisfactory is that abuse of discretion may constitute a breach of the *ultra vires* doctrine and yet lie beyond the reach of certiorari because it is not a jurisdictional matter.

Can the scope of certiorari be extended by judicial decision to remedy this situation? "The scope of the prerogative writs . . . may not yet be exhausted"[83]: but it would need a singularly courageous court to cut certiorari free from its entanglement with the concept of jurisdiction. There are those who will say that to enlarge the scope of certiorari to cover abuses of discretion is unnecessary because the work is already being done by mandamus and that in doubtful cases the desired result can usually be achieved by a combined application for certiorari and mandamus.[84] The answer to this argument is that the availability of mandamus in this context is more often than not based on a threadbare pretence that a jurisdiction or discretion abused has never been exercised, and fictions are an unsound foundation for the law. Moreover, the exact scope of mandamus is far from clear; and this uncertainty is largely accounted for by the tenuous reasoning by which the issue of the order is often justified.

The present law of judicial remedies does not call for radical revision; but if the analysis that has been made in this article is correct some changes are desirable. The arguments in favour of change are strengthened by recent evidence that the courts themselves are by no means certain of the principles that should govern the issue of the remedies.[85] The law would be clarified if the ambit of certiorari and prohibition were to be confined to courts *stricto sensu*, and if they were to be replaced by decrees of annulment and injunctions in relation to administrative bodies. Review would then proceed on the basis not of jurisdiction but of *vires*. Thus, the exercise of a discretion on irrelevant grounds would justify the issue of a decree of annulment. These changes would not inevitably lead to any substantial increase in the scope of review. Reviewing courts would usually reach the same conclusions as

[83] Lord Justice Denning, "The Universities and Law Reform" (1949) 1 J.S.P.T.L. (N S.) 258 at 268.

[84] It is impossible to combine an application for certiorari or mandamus with an action for a declaration.

[85] See, *e.g.*, the *Salford*, *Pontypridd* and *Brighton Cases*, cited notes 19, 59 and 82, *supra*.

at present, but by a less circuitous route. The new remedies would not solve all or most of the problems of judicial review, but they would make it possible to discuss them without constant recourse to the jargon of jurisdiction. They would also enable mandamus to be confined to a narrower but more appropriate field of operation.[86] Further, they would reduce the dangers of losing a sound case as a result of selecting the wrong remedy.[87]

Implicit in these proposals is the assumption that the total area of review covered by the existing remedies corresponds roughly with what, in the present state of our statute law, it is desirable for them to cover. Some writers complain that these remedies do little more than scratch the surface of the administrative process; that they penalise the administration for technical and formal errors but too often fail to give redress for the unreasonable or oppressive use of powers. But if the scope of judicial review is inadequate, surely the true explanation is the form in which powers are conferred on administrative bodies. It is the duty of the courts to interpret and apply the intention of the legislature in so far as this can be elicited from the words it has used; and a vast amount of modern legislation is drafted in language that plainly shows an intention to exclude or attenuate judicial review of administrative action. Powers are conferred in terms so broad that it becomes virtually impossible for a court to say that they have been exceeded. If Parliament makes an administrative authority judge in its own cause, or empowers it to disregard the *audi alteram partem* rule, the common law rules of natural justice cannot apply to it. Tribunals are empowered to judge conclusively the limits of their own jurisdiction and to make decisions that need be related only to their own conceptions of public policy. The courts are justifiably chary of appearing to substitute their own opinions for those of administrative bodies on matters that may be the subject of political controversy or involve specialised technical or local knowledge.

There can be no question of any appreciable expansion of the present system of judicial review until the initiative is taken by Parliament—that is to say, by the government that controls Parliament. Of that initiative there is no sign. If a new system of specially staffed administrative courts of appeal were to be established the administration might show less reluctance to submit its conduct to review. But the ghost of Dicey still stalks Westminster and the Temple, and only when it has been exorcised will such a proposal receive the dispassionate investigation that it deserves.

S. A. de Smith.[88]

[86] There is a case for relieving mandamus of certain restrictive rules that limit its availability in its proper field.

[87] "The problem of whether a prerogative writ will lie bears a startling resemblance to the question whether the proper form of action had been followed" (Stanley E. Edwards in (1947) 25 Can.B.R. at 1159).

[88] Lecturer in Law at the London School of Economics and Political Science.

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THE TORT OF CONSPIRACY

THE tangle of cases which was the source of the civil law of conspiracy has to a great degree been clarified by the decision of the House of Lords in *Veitch's Case*.[1] The tort of conspiracy is now a fairly clear passage of the law. But it is the purpose of this article to submit that in their most laudable desire to inject sense and rationality into a confusing topic, the House of Lords in *Veitch's Case* erected a principle of a peculiar flavour and of doubtful practical value.

Before *Veitch's Case*, and indeed after it in some places, it was customary to say that the tort of conspiracy arose when there was an agreement of two or more persons to do an unlawful act, or to do a lawful act by unlawful means, causing damage to the plaintiff. This definition would seem to be based on a fallacy in logic. For it was generally agreed that unlike the crime of conspiracy, the mere fact of agreement could not constitute the tort. To give rise to tortious liability there must be some carrying out of the agreement, causing damage. But it would seem evident that if there is some carrying out of an agreement to do an unlawful act or to employ unlawful means then this is equivalent to the doing of an unlawful act. In other words, under this definition, the existence of a tort of conspiracy would be quite otiose, for the defendants could always be sued as joint tortfeasors under some other specific heading of tortious liability. Indeed this view of conspiracy meant that a confusing element was often introduced into cases which could have been decided quite simply under the definition of some existing tort. For example the case of *South Wales Miners Federation* v. *Glamorgan Coal Co.*[2] has been quoted as authority[3] in a vigorous argument supporting the definition of conspiracy as outlined above. In that case the appellants induced miners to break their contracts of service with the respondents, with the object of sending up the price of coal and in consequence of increasing their wages. The House of Lords found the appellants liable. In the course of his speech Lord James said: "The defendants' intention clearly was that the workmen should break their contracts. Their motives no doubt were that by so doing wages should be raised. But, if, in carrying out the intention, the defendants purposely procured an unlawful act to be committed, the wrong that is thereby inflicted cannot be obliterated by the

[1] *Crofter Harris Tweed Company* v. *Veitch* [1942] A.C. 435.
[2] [1905] A.C. 239.
[3] *Vide* 36 L.Q.R. 38, "Conspiracy as a Ground of Liability in Tort," by Dr. J. Charlesworth.

existence of a motive to secure a money benefit to the wrong-doers."

The learned author of the article referred to treated this as a case of conspiracy and therefore argued that the essential element of conspiracy is not purpose or motive or malice, but the agreement to do an unlawful act. The argument would be sound but for the weakness of its premise. Lord James was pointing out that an unlawful act does not become lawful simply because of a good motive. The defendants were clearly liable for the tort of interference with contract. The case has nothing to do with conspiracy. It was an action against joint tortfeasors for inducing the breach of a valid, existing contract. If there had been a single defendant the result would have been the same, and conspiracy was not a relevant element.

To get a clear picture of the tort the first essential is then to realise that whenever the defendants have done an act which can be brought under the heading of some other specific tort there is no question of conspiracy. Or at any rate there should be no such question, for to introduce it is merely to confuse and complicate a simple issue. (A similar situation may be perceived in the criminal law of conspiracy; *vide R.* v. *Cooper and Compton.*[4])

It is submitted that if conspiracy is to have any meaning as a tort it should be confined to acts which if done by one person would not give rise to liability. If it is so confined then it does indeed constitute a new head of liability. But unfortunately, even in *Veitch's Case*, the House of Lords, although they make it clear that conspiracy does include such cases, still appear from their language to embrace the old definition as well, *i.e.*, to include acts which have a separate tortious existence apart from conspiracy. This is to be regretted for it retains the superfluous element. This point was perceived and treated of by Lord Sumner in *Urquhart* v. *Clark*,[5] where the noble lord said: "As to the measure of damages, it may be that there are cases in which proof that a joint tort was done in pursuance of a conspiracy to do it, will justify some increase of the damages to be awarded for the tort itself, though none such has occurred to me. . . . A plaintiff cannot be allowed simply by using one technical term where another would equally cover the wrong to aggravate the jury into giving him extra money."

The major importance of *Veitch's Case* then is that it gave certainty to the unsettled doctrine that, in some circumstances, an act which if done by one person is lawful can be unlawful if done by more than one person in combination. And *Veitch's Case* of course also confirms for us what those circumstances are in which this situation arises. It can be stated quite simply by saying that

[4] (1947) 32 Cr.App.R. 102.
[5] [1930] A.C. at p. 50.

all combinations which injure another person are unlawful unless the real purpose of the combination is not to injure another but to further or protect the legitimate interests of those combining.

Two extremely interesting points emerge. First, the House of Lords has in effect created a general theory of tortious liability for two or more people acting in combination. While an individual cannot be successfully sued in tort unless his act can be brought within the ambit of a specific tort, two combining individuals who cause damage can always be sued unless they can prove the purity of their motives. Conspiracy has become a tort of megalomaniac pretensions which in effect is not a specific tort at all but a declaration of general tortious liability for two or more acting in concert. The House of Lords seems to have been aware of this, although it is not directly mentioned in the speeches, and seems not to have been troubled by its possibilities.

Secondly, as has often been demonstrated, what is vital is the motive of the combiners. A bad motive will here convert an otherwise lawful act into an unlawful one, or, to reverse the proposition, a good motive will deprive an otherwise unlawful act of its unlawful character. Now the general principle of English civil law has of course always been that a lawful act cannot be made unlawful simply by an impurity of motive. Authoritative statements in support of this principle are legion. It will be sufficient to quote two. In *Allen* v. *Flood*,[6] Lord Watson said: "The existence of a bad motive in the case of an act which is not in itself illegal will not convert that act into a civil wrong for which reparation is due." In *Bowen* v. *Hall*,[7] Lord Coleridge said: "I do not know . . . that it has ever been held that the same person for doing the same thing, under the same circumstances with the same result, is actionable or not actionable, according to whether the inward motive was selfish or unselfish for what he did." It now appears then that when we are dealing with persons and not a person the old learning is to be ignored and motive is all important. This trend in the tort of conspiracy, now finally confirmed by *Veitch's Case* was commented on as long ago as 1892 in an article in the *Law Quarterly Review*.[8] Writing of the novelty and uncertainty of the motive test, the learned author said: "But it is difficult to see how malice . . . can possibly form an element in what, for want of a better word, may be called 'unfair competition in trade.' How can motive in such a case be determined? Is it to be said that a given interference with the trade of another is lawful if the act is done for the object of personal gain, but unlawful if done with the object of causing loss to a rival? The attempt to distinguish between the two at law . . .

[6] [1898] A.C. 1.
[7] (1881) 6 Q.B.D. 333.
[8] 8 L.Q.R. 140, "Malice in the Law of Torts," by Ormesby J.

seems to me about as reasonable as to make it a rule of billiard pool that 'a life,' if taken with the object of increasing the striker's score, counts, but that it does not count if the object be to keep down the score of an opponent."

As another writer has observed,[9] motive in this context is as difficult to determine as to decide whether a soldier fires for the purpose of injuring the enemy or of defending his country.

Not only in its general but also in its particular application is motive an unsatisfactory test. *Veitch's Case* tells us that if the motives are mixed, we must look for the predominant purpose. But what if A and B combine and A is clearly acting to protect his own interests while B is clearly acting with a malicious desire to injure the plaintiff? How then can we find a predominant purpose? In the case of *Pratt* v. *British Medical Association*,[10] McCardie J. expressed a definite view on this point to the effect that "the proved malice of one or more may be attributed to the other participants of the combination." But in the case of *McKernan* v. *Fraser and Another* in the High Court of Australia,[11] Evatt J. thought that even if it had been established that the defendant himself had acted merely to gratify a private grudge he would still not be liable for conspiracy unless it could be shown that those who acted with him had been similarly impelled. And he was of the opinion that even if several members were so actuated they would not render themselves so liable unless the common purpose was malicious. This point is then still unsettled and since it is not merely an academic hypothesis, but one very likely to arise in practice, it demonstrates the insufficiency of the test.

In *Veitch's Case*, Lord Simon adopted a passage from the judgment of Phillimore J. in *Boots* v. *Grundy*,[12] where the learned judge said: "If the combination be to further their own prosperity, if it be constructive or destructive only as a means to being constructive, it is otherwise" (*i.e.*, it is not actionable). When the result of an action depends on distinguishing between an act which is purely destructive and one which is destructive as a means to being constructive, we are driven to conclude that the civil law of conspiracy has slipped into casuistry.

A final and curious matter is the extent to which this view of the tort of conspiracy impinges on the criminal law. The definition in *Veitch's Case* forces us to conclude that if, in the case of the *Mayor of Bradford* v. *Pickles*,[13] Mr. Pickles had been unlucky enough to associate himself in his enterprise with a neighbouring landowner or presumably even with an assistant, he would have been liable for the tort of conspiracy under the present view of it.

[9] Professor D. J. Llewelfryn Davies in 49 L.Q.R. 826.
[10] [1919] 1 K.B. 244.
[11] *Vide* note by Professor D. J. Ll. Davies in 49 L.Q.R. 826.
[12] (1900) 82 L.T. at p. 778.
[13] [1895] A.C. 587.

Presumably then he would also incur criminal liability for the crime of conspiracy, for it has always been assumed that the two go hand in hand.

And here we come face to face with the curse of legal reasoning —the vicious circle. We are told that we have the tort of conspiracy in a combination to injure, though the act may be lawful if done by one. But a combination to do a lawful act could not be the crime of conspiracy. Presumably it now may be the crime since the definition of the tort now will make the carrying out of the combination unlawful, if its predominant purpose is to injure another. This means that the broadening of the tort has also broadened the crime. And yet we are told that the tort depends upon the crime. This can be seen in the definition of the tort given in Jenks' *Digest of the Civil Law*[14]: "If two or more persons enter into a criminal conspiracy with the design of causing harm to another person and harm is directly caused by such conspiracy to such person, such person will have an action for damages, etc." Does the crime make the tort, or the tort make the crime, or are they quite independent?

The only way of cutting the knot would seem to be to declare that since *Veitch's Case* the historical dependence of the tort upon the crime is at an end.

In conclusion it is submitted that the existence of the tort of conspiracy is not a valuable addition to the scope of the English law of tort. Where there is a combination to do an act in itself unlawful, then an adequate remedy already exists. Where the combination is to do an act not in itself unlawful, then the present sweeping principle based on the most unsatisfactory of all tests would seem to be a needless extension of the law. The extreme paucity of successful actions for conspiracy indicates this, for, as has already been suggested, many cases, commonly quoted as cases of conspiracy, were or could have been decided under the heading of other torts.

G. J. HUGHES.[15]

[14] Jenks, *English Civil Law*, 4th ed., p. 450.
[15] Assistant Lecturer in Law at University College, Hull.

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(2) *Constitutional Law.* M. E. Bathurst: "Legislation in the Federal Republic of Germany," 1 Int. and Comp.L.Q. 40. Z. Chafee, Jr.: "Federal and State Powers under the United Nations Covenant on Human Rights," (1951) Wis.L.R. 389, 628. W. Christian: "Burma's new Constitution and Supreme Court," 26 Tulane L.R. 47. C. J. Hamson: "Le Conseil d'Etat Statuant au Contentieux," 68 L.Q.R. 60. "The Nationalisation of British Industries," 16 Law and Contemp.Prob.No. 4. E. L. Richardson: "Freedom of Expression and the Function of Courts," 65 Harv.L.R. 1. D. S. Stern: "Full Faith and Credit—the Mexican Experience," 26 N.Y.U.L.Rev. 668. H. Weinschel: "The Constitutions of the Fourth French Republic and of the Italian Republic: a comparative study," 20 Geo.Wash.L.R. 127.

(3) *Administrative Law.* C. J. Antieau: "The Power of Municipal Corporations to Protect the Public Health and Safety," 1951 Wash.U.L.Q. 358. C. Ettori: "Le Contrôle Juridictionnel de l'Administration en Italie," 67 Rev. Droit Public 997.

(4) *Family Law.* Z. Cowen: "Domestic Relations: Actions for Loss of Consortium," 25 Austr.L.J. 390. R. Gottschalk: "Personal Status and Religious Law in Israel," 4 Int.L.Q. 454. G. W. Wilton: "Peccavis in Divorce Law and Practice," 68 Jurid.Rev. 180.

(5) *Law of Property and Succession.* C. H. Alexander: "Foreign Investment Laws and Regulations of the Countries of Asia and the Far East," 1 Int. and Comp.L.Q. 29. G. Craven: "Powers of Appointment Act of 1951," 65 Harv.L.R. 55. E. L. Fisch: "Judicial Attitude Towards the Application of the *cy-près* Doctrine," 25 Temple L.Q. 177. R. Gottschalk: see (4). G. B. Graham: "Tenants in Possession and Third Parties," 15 Conv.(N.S.) 381. J. Gutteridge: "Expropriation and Nationalisation in Hungary, Bulgaria

and Roumania," 1 Int. and Comp.L.Q. 14. "Institutional Investments," 17 Law and Contemp.Prob.No. 1. W. B. LEACH: "Perpetuities: Staying the Slaughter of the Innocents," 68 L.Q.R. 85. R. E. MEGARRY: "The Rent Acts and the Invention of New Doctrines," 67 L.Q.R. 505. G. E. PALMER: "Testamentary Disposition to the Trustee of an *inter vivos* Trust," 50 Mich. L.R. 88. P. ROUBIER: "Le Droit Unioniste de la Propriété Industrielle," 78 J. du Droit Internat. 676, 1040. M. SAPORTA: "De Certaines Expropriations du Droit d'Auteur dans les Rapports Internationaux," 78 J. du Droit Internat. 1120. E. H. SCAMMELL: "The Special Position of Limited Owners of Agricultural Land," 15 Conv.(N.S.) 415. N. SIEGEL: "Trends in Federal Rent Control Decisions," 18 U. of Pittsburgh L.R. 1. J. B. SWEETMAN: "Relief from Forfeiture of Leases," 15 Conv.(N.S.) 406. "What Makes a Successful Tax Lawyer?": see (1). J. W. WILLIS: "Some Miscellaneous Methods of Fixing Maximum Rents," 6 Loyola L.R. 14.

(6) *Law of Contract.* M. FERSON: "Agency to Make Warranties," 5 Vanderbilt L.R. 1. J. G. FLEMING: "Misrepresentation and the Sale of Goods," 25 Austr.L.J. 448. J. D. SMITH: "A Refresher Course in Cause," 12 Louisiana L.R. 2. B. SMYRNIADIS: see (14).

(7) *Law of Tort.* Z. COWEN: "The Adequate Award: a Footnote," 39 Calif.L.R. 877. L. W. LEVY: "Chief Justice Shaw and the Formative Period of American Railroad Law," 51 Col.L.R. 827, 852. W. A. SEAVEY: "Candler v. Crane, Christmas & Co.: Negligent Misrepresentation by Accountants," 67 L.Q.R. 466.

(8) *Commercial Law.* K. S. CARLSTON: "Antitrust Policy: a Problem in Statecraft," 60 Yale L.J. 1078. C. E. CORKER: "Risk of Loss from Forged Indorsements: a California Problem," 4 Stanford L.R. 24. R. J. CUDNEY: "Corporations Without Share Capital," 29 Can.B.R. 846. D. C. DRAPER: "What is a 'Clean' Bill of Lading? a Problem of Financing International Trade," 37 Cornell L.Q. 56. M. FERSON: see (6). J. G. FLEMING: see (6). G. HORNSBY: "Share Values and Premiums," 67 L.Q.R. 522. "Institutional Investments," see (5). E. G. MARTIN: "The Conflict Between Foreign Trade Agreements and Price-support Programs," 37 Cornell L.Q. 17. "Some Effects of the Uniform Commercial Code on New York Law—a Symposium," 26 St John's L.R. 1. B. WEINTRAUB and H. LEVIN: "Bulk Sales Law and Adequate Protection of Creditors," 65 Harv.L.R. 418. D. McC. WRIGHT: "Some Pitfalls of Economic Theory as a Guide to the Law of Competition," 37 Virg.L.R. 1088.

(9) *Industrial and Labour Law.* K. S. CARLSTON: see (8). C. KIRSHNER: "The Colour Television Controversy," 18 U. of Pittsburgh L.R. 65. "The Nationalisation of British Industries": see (2). J. R. NEWMAN: "The Atomic Energy Industry: an Experiment in Hybridisation," 60 Yale L.J. 1268. J. W. RAISBECK, JR.: "Labor Legislation of Columbia," 26 Tulane L.R. 1. D. McC. WRIGHT: see (8).

(10) *Law of Evidence.* P. B. CARTER: "Evidence Act, 1938: Problems of Interpretation," 68 L.Q.R. 106. E. L. FISCH: "Lay Opinions in New York," 37 Cornell L.Q. 32.

(11) *Civil Procedure.* "Reform of Civil Procedure—a Symposium," 40 Kentucky L.J. No. 1.

(12) *Criminal Law and Procedure and Criminology.* R. CROSS: "Larceny by an Owner and *Animus Furandi*," 68 L.Q.R. 99. TH. SELLIN: "The Significance of Records of Crime," 67 L.Q.R. 489. R. J. WAYBRIGHT: "Florida's New Juvenile Court Act," 6 Miami L.Q. 1.

(13) *Conflict of Laws.* C. H. ALEXANDER: see (5). Z. COWEN: "Divorce and the Domicile," 68 L.Q.R. 88. A. A. EHRENZWEIG: "The Place of Acting in International Multistate Torts: Law and Reason Versus the Restatement," 36 Minn.L.R. 1. R. GOTTSCHALK: see (4). E. N. GRISWOLD: "Divorce Jurisdiction and Recognition of Divorce Decrees: a Comparative Study," 65 Harv.L.R. 193. J. GUTTERIDGE: see (5). W. D. HAWKLAND: "Control of Foreign Corporate Activity by the State of Incorporation," 6 Miami L.Q. 41. P. ROUBIER: see (5). M. SAPORTA: see (5). J. R. STEVENSON: "Effect of Recognition on the Application of Private International Norms," 51 Col. L.R. 710.

(14) *International Law.* C. H. ALEXANDER: see (5). M. BRANDON: "Final Clauses in Multilateral Conventions," 4 Int.L.Q. 467. Z. CHAFEE, JR.: see (2). L. C. GREEN: "The Nature of the 'War' in Korea," 4 Int.L.Q. 462. J. GUTTERIDGE: see (5). P. E. JACOB: "The Legality of United Nations Action," 18 U. of Pittsburgh L.R. 29. D. H. N. JOHNSON: "Control of Exploitation of Natural Resources in the Sea Off the United Kingdom," 4 Int.L.Q. 445. P. ROUBIER: see (5). M. SAPORTA: see (5). J. R. STEVENSON: see (13). K. WILK: "International Law and Global Ideological Conflict: Reflections on the Universality of International Law," 45 Am.J.Int.L. 648. B. SMYRNIADIS: "Le Sort, en cas de Guerre, des Traités de Droit Privé," 55 Rev. gén de Droit Internat. Public 489.

W. A. STEINER.

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NOTES OF CASES

Certiorari and Speaking Orders

The important decision of the Divisional Court in *R.* v. *Northumberland Compensation Appeal Tribunal, ex p. Shaw* [1951] 1 K.B. 711, in which it held that certiorari would issue to quash the decision of a statutory tribunal where error of law appeared on the face of the record, has been affirmed by the Court of Appeal ([1952] 1 T.L.R. 161). The case was noted in 14 Mod.L.R. 207, but the judgment of Denning L.J. in the Court of Appeal raises some interesting points and calls for further comment.

In the Court of Appeal it was again contended for the tribunal that certiorari did not lie to quash the decision of a statutory tribunal for a patent error of law unless the error went to jurisdiction. All members of the court rejected this contention. Singleton and Morris L.JJ. substantially repeated the reasoning of Lord Goddard C.J. in the court below. The jurisdiction of the King's Bench Division in this matter is supervisory, not appellate, since a court is limited to quashing the order and cannot substitute its own order for that of the tribunal. (In describing the court in the earlier note as exercising "what is in effect an appellate jurisdiction" the writer was guilty of a lamentable malapropism.) Denning L.J. sought to establish that there were precedents for the present decision, and cited cases concerning the Commissioners of Sewers and auditors' certificates. But the Commissioners of Sewers had been made a court of record by statute; and auditors' certificates were removed by a statutory certiorari, which was, unlike common law certiorari, generally treated as being a method of appeal. It seems probable that this is the first English case in which common law certiorari has issued to a body other than a court *stricto sensu* for error of law on the face of the record.[1] That the decision is a sound one can hardly be doubted. In many cases the courts have held that the other grounds on which certiorari will issue to quash the decisions of inferior courts apply, *mutatis mutandis*, to administrative tribunals. Why should they make an exception in this instance? To impute to Parliament, when it provided for the establishment of an administrative tribunal, an intention that the tribunal should be immune from a supervisory jurisdiction that had fallen into oblivion, is to display more ingenuity than persuasiveness. In any event Parliament can, by the use of apt words, exclude the jurisdiction of the courts. And whilst it is conceivable that the present decision may discourage

[1] There is a recent Canadian precedent: *John East Iron Works, Ltd.* v. *Labour Relations Board of Saskatchewan* [1949] 3 D.L.R. 51.

some tribunals from giving written reasons for their decisions in future,[2] such a possibility is obviously not one that should weigh with a court in determining the scope of certiorari.

It was also contended for the tribunal that, although it had erred, the error did not appear on the face of the record. Singleton and Morris L.JJ. held that this submission was not open to the tribunal, since it had conceded before the court below that the error was apparent on the record. Singleton L.J. held, moreover, that the error did appear on the record; Morris L.J. expressed doubts on this point. Denning L.J. took a different view, and considered the submission at some length. Following the cases on orders and convictions by justices, he held that the record of a tribunal must contain the document initiating the proceedings, the pleadings (if any) and the adjudication, though it need not include the evidence or the reasons for the decision. Here the record was incomplete in that, although it included the reasons for the decision, it did not include the claim originally lodged with the compensation authority or their order or the notice of appeal to the tribunal. The court had power to order the record to be completed. However, this was unnecessary, because it had been openly admitted that the decision was erroneous. He was "clearly of opinion that an error admitted openly in the face of the court can be corrected by certiorari as well as an error that appears on the face of the record" (at 172). It was a general rule that the courts could not take cognizance of errors of law that were not apparent on the record, but the parties could overcome this difficulty by consent, either by agreeing that the question should be argued and determined as if it had been expressed in the order (*R.* v. *Essex* (*Inhabitants*) (1792) 4 T.R. 591 and later cases) or by agreeing that affidavits be entered disclosing the points of law that had been decided by the tribunal. This course was taken only if no one objected. Recent cases showed that the practice still continued.

It is respectfully submitted that Denning L.J.'s statement of the law is too wide. There is not sufficient authority to support a general proposition that by consent of the parties affidavit evidence or admissions in the face of the court may properly be used to disclose errors of law that are not apparent on the record of a tribunal. Whilst it is true that in several old rating cases affidavits were admitted to disclose latent errors of law, in a number of well-known cases the courts have held that they are not admissible except to show excess or want of jurisdiction, breach of the rules of natural justice or fraud. Nowhere, it seems, has it been held that consent of the parties renders extrinsic evidence admissible for any other purpose in certiorari proceedings. In the cases cited by

[2] See the reply given by the Minister of Local Government and Planning to a parliamentary questioner who suggested that rent tribunals be advised to issue "speaking" orders in cases of difficulty: 447 H.C.Deb. 1732–1733 (May 8 1951).

only the House of Lords can and, it is hoped, will at some time overrule, the plaintiff could not rely on the trading character of the transaction or on the fact that the foreign State's trading activity had occurred in this country: *Krajina* v. *Tass Agency* [1949] 2 All E.R. 274, commented upon at (1949) 12 Mod.L.R. 494. However, he relied on a clause in the contract according to which the defendant State had expressly submitted to the jurisdiction of the English courts. The Court of Appeal (Jenkins and Birkett L.JJ.) rejected his argument and thus disappointed Mr. Fawcett's conclusion that "the principle of sovereign immunity is fast becoming an anachronism as far as State traders are concerned": "Legal Aspects of State Trading," *British Year Book of International Law 1948*, 84 at p. 47. In view of certain observations in *Duff Development Co., Ltd.* v. *Government of Kelantan* [1924] A.C. 797, the result was almost inevitable. In that case it was held that neither an arbitration clause, incorporating the provisions of the Arbitration Act, nor an application by the defendant State to set aside an award amounted to a submission to the jurisdiction of the courts. Some of their Lordships said that submission was possible only in the face of the court and the breach of a contract to submit was not the same as an actual submission. Though these remarks might be said to have been *obiter* and are perhaps not unimpeachable, the Court of Appeal could not but follow the guidance given by the House of Lords. The trouble is that, when applying rules which stem from and are said to represent international law, English courts consider themselves bound by national rather than international precedents. Art. 8 of the Draft Convention on jurisdiction over foreign States which the Harvard Research published in 1932 suggested that a State should not be entitled to immunity, if the State had previously consented to the institution of proceedings by a contract upon which the proceedings are based. The eminent authors described this rule as "so obviously equitable that its general acceptability may be assumed." They did not find any decision opposed to their solution (apart from the English cases), but discovered two Supreme Court decisions, from Germany and Greece respectively, which expressly supported their thesis: see *American Journal of International Law* (Supplement) 1932, 458, 548 *et seq.* There is reason to believe that, if in matters of international law English courts were able to free themselves from their self-imposed fetters and to follow international rather than national precedents, our present difficulties would not have arisen and the Departmental Committee, convened as a result of *Krajina's Case, ubi supra*, either would not be required or could suggest a convenient method for the adoption of such recommendations as it may make. Would it not be practicable to have the whole problem of the immunity of *l'État Commerçant* referred to the Judicial Committee of the Privy Council for authoritative clarification?

F. A. MANN.

CRIMINAL LAW—LARCENY—RECEIVING

IT is well settled that if a wife "steals" *de facto* from her husband, but is living with him and has no intention of deserting him (so that she does not steal *de jure*), and if she then gives the goods to a third party who has knowledge of the circumstances, the third party cannot be convicted of receiving stolen goods, because the goods have not been stolen. This being so, the decision in *Walters* v. *Lunt* [1951] 2 All E.R. 645 was inevitable. There the theft *de facto* was not by a married woman but by a boy under eight; it was held that his parents could not be convicted of receiving because the boy could not be convicted of stealing.

Could the parents have been convicted of anything else? If they had instigated the child to take the goods, they would have been guilty of stealing through an innocent agent; but of that there was no evidence. The concept of ratification is not applied in the criminal law. Lord Goddard C.J., with the concurrence of the other members of the court, suggested that the parents could be convicted of larceny by a bailee. With every respect, this seems to involve an undesirable fiction. For no other legal purpose would the parents have been regarded as the bailees of the true owner. If they were bailees from anybody, it was from their son; but they were not even bailees from him if he did not intend to have the goods back. Anyway they did not commit larceny as bailees from their son. Another suggestion made by Lord Goddard (indeed, as reported it was not so much a suggestion as a positive affirmation) was that if when the child brought the goods home the parents thought that the owner could be discovered by taking reasonable steps, the parents would be guilty of larceny by finding. Lord Goddard also intimated that it would be for the police to decide whether to prefer the charge of larceny. It seems somewhat unfortunate that the court should have uttered this *obiter dictum* so categorically, when it had not heard counsel for the parents (who did not appear on the appeal), and when there was a possibility that if a charge of larceny by finding were preferred, it would come back to the same court by way of appeal. The argument against the *obiter dictum* would seem to be cogent. Larceny by finding is not an offence on its own; it is ordinary larceny committed in certain circumstances, and it must comply with the rules of larceny. Two of these rules are that the prosecutor must be in possession at the moment of taking, and that the accused must obtain possession by the taking. How can it be said that the prosecutor was here in possession at the moment when the parents received from their son? In larceny by finding, the owner is deemed to be in possession although he has lost the thing and does not know where it is; but it would be going beyond any previous authority to say that the prosecutor is still in possession of goods that have been taken from him by another against his

will. Such a doctrine would make every receiver of stolen goods guilty of larceny.

What is needed is not a further distortion of the law of larceny but an amendment of the Larceny Act in respect of the offence of receiving. In Roman law, a wife or *filiusfamilias* could not commit *furtum* from the *pater*, but the thing became *res furtiva* and accomplices were liable. We need the same conception in England.

GLANVILLE WILLIAMS.

KNOWLEDGE IN STATUTORY OFFENCES

Knowledge and the Burden of Proof

Where a principle of law is enunciated and, during the passage of over half a century, evokes no adverse comment its accuracy tends to become generally accepted. If such a pronouncement has been repeatedly cited with approval any doubts which may be expressed as to its correctness are likely to be viewed with suspicion. Nevertheless, Devlin J. in *Roper* v. *Taylor's Central Garages (Exeter) Ltd.* [1951] 2 T.L.R. 284, at pp. 287–288, took his stand on sure ground when expressing his doubts as to the accuracy of a well-known passage from the judgment of Day J. in *Sherras* v. *De Rutzen* [1895] 1 Q.B. 918, at p. 920, relating to the burden of proof in crimes involving the presence or absence of the word "knowingly." That ground has been well trodden before by others concerned to point out the confusion caused by the failure to indicate in which sense the phrase "burden of proof" is used.[1]

The offence in *Sherras* v. *De Rutzen* was supplying a police constable on duty with intoxicating liquor, contrary to section 16 (2) of the Licensing Act, 1872.[2] The prosecution contended that the offence was one in which proof of *mens rea* was not necessary, pointing out that whereas section 16 (1) made it an offence to "knowingly harbour on licensed premises any constable on duty," the epithet "knowingly" was missing from section 16 (2). Rejecting this argument Day J. stated that the absence of "knowingly" in section 16 (2) only *shifted* the onus of proof so that it was for the defence to prove lack of knowledge and not for the prosecution to prove that there was knowledge. R. S. Wright J., the other member of the court, made no reference to the effect on the burden of proof.

It is worth noting that this was not the first occasion where the above principle had been put forward, for Brett J. in *R.* v.

[1] See for example "Presumptions and Burdens," by Lord Justice Denning (1945) 61 L.Q.R. 379, and an article under the same title by Nigel Bridge (1949) 12 Mod.L.R. 278–289, in which Lord Justice Denning's reclassification of the conceptions involved under the general heading of burden of proof and presumptions is criticised, and an alternative reclassification is suggested.

[2] Now contained in the Licensing (Consolidation) Act, 1910, s. 78.

Prince (1875) 2 C.C.R. 154, at p. 161, had stated that "the ultimate proof necessary to authorise a conviction is not altered by the presence or absence of the word 'knowingly,' though by its presence or absence the burden of proof is *altered*." Although this rule was adopted without hesitation by Humphreys J. in *Gaumont British Distributors Ltd.* v. *Henry* [1939] 2 K.B. 711, at p. 721, the same judge is seen in *Harding* v. *Price* [1948] 1 K.B. 695 taking up a more cautious attitude. In the latter case, the Divisional Court was concerned with the wording of section 22 (2) of the Road Traffic Act, 1930, which replaced the corresponding section in the repealed Motor Car Act, 1903. Whereas under section 6 of the 1903 Act guilt depended on a person "knowingly acting in contravention of the section," section 22 (2) of the 1930 Act omits the word "knowingly," making it an offence simply to fail to report a road accident within twenty-four hours of its occurrence. According to Humphreys J. (at p. 708) the effect of the change was to render the offence one not requiring any proof of knowledge, leaving untouched the question whether proof of absence of knowledge on the part of the defendant affords in law a defence. The other members of the court invoked the words of Day J. in *Sherras* v. *De Rutzen*, Lord Goddard C.J., explaining (at p. 700) that the absence of the word "knowingly" *altered* the burden of proof, while Singleton J, said (at p. 704) the effect was to *shift* the burden of proof. Insomuch as both judges laid no stress on their choice between the words "alter" and "shift" it may be assumed that they were intended to convey the same meaning.

This view is borne out by reference to *Reynolds* v. *G. H. Austin & Sons, Ltd.* [1951] 2 K.B. 135, where Lord Goddard in elaborating on the meaning which he attributed to the passage from *Sherras* v. *De Rutzen* (*supra*) said that the absence of "knowingly" in the statute only *shifted* the onus of proof. He went on to say (at p. 145): "This affirms the principle that except in cases where the statute creates an offence of knowingly doing an act the prosecution can establish a prima facie case merely by proving the act was done.[3] Lack of knowledge must be proved by the defendant, as the burden of proving knowledge or the lack of it with respect to the act to be proved depends on the opportunities of knowledge which may be possessed by the respective parties":— for which proposition Lord Goddard referred to Stephen's *Digest of the Law of Evidence* (12th ed.) Art. 104.

When considering the accuracy of the rule as stated in *Sherras* v. *De Rutzen* and repeated in subsequent cases, the main difficulty arises in ascertaining in what sense the different judges used the expressions "*alter* the burden of proof" and "*shift* the burden of proof." There are, of course, two separate categories of burden

[3] As will be seen later, the Lord Chief Justice in *R.* v. *Cohen* [1951] 1 K.B. 505 disregarded this so-called exception.

of proof.[4] First, there is what has been conveniently described as the *legal* burden of proof[5] and which, in criminal cases (unless otherwise directed by statute) imposes upon the prosecution the duty of proving the accused guilty of the offence charged.[6] Instances of statutory provisions which are exceptions to the general rule occur in the Larceny Act, 1916, s. 28, the Explosives Substances Act, 1883, s. 4, the Merchandise Marks Act, 1887, s. 2, and the Immoral Traffic (Scotland) Act, 1902. Used in this first sense the burden of proof is fixed. It cannot be altered, neither does it shift during the course of the trial. Furthermore, the question whether or not the legal burden has been discharged does not arise until all the evidence, for the prosecution and for the defence, has been given.

Secondly, there is what has been called the *provisional* burden of proof.[7] Used in this sense the burden of proof rests on the party who, unless he is resigned to an adverse verdict, must either call further evidence or adduce arguments explaining away or rebutting an inference which the court may otherwise feel compelled to draw from the existing evidence. Admittedly difficult to pin down, and as often as not more apparent than real, burden of proof in this second sense is fluid and may shift to and fro during the course of the trial.

Turning now to *Roper* v. *Taylor's Central Garages Ltd.*, it seems clear that Devlin J. based his doubts as to the accuracy of the principle stated in *Sherras* v. *De Rutzen* on the understanding that Day J., and Lord Goddard in the later cases, were referring to the *legal* burden of proof. Accepting that, as an ordinary principle of the law of evidence, the statement from Stephen's *Digest* was correct, Devlin J. continued (at p. 288): ". . . but Mr. Justice Day seems to me to be going further than that, and to be saying that the absence of 'knowingly' in the statute *as a matter of construction*[8] shifts the burden of proof." After referring to statutes where the burden of proof is expressly shifted on to the defence, giving as an example the Merchandise Marks Act, 1887, Devlin J. went on to relate the presence or absence of the word "knowingly" to the requirement of *mens rea*. The learned judge added: "All that the word 'knowingly' does is to say expressly what is normally implied, and if the presumption that the statute requires *mens rea* is not rebutted I find difficulty in seeing how it can be said that the omission of the word 'knowingly' has, as.

[4] As Viscount Sankey L.C. said in *Woolmington* v. *D.P.P.* [1935] A.C. 462, at p. 479: "The word 'onus' is used indifferently throughout the books, sometimes meaning the next move or next step in the process of proving or sometimes the conclusion of the whole matter."

[5] See 61 L.Q.R., p. 879.

[6] Finally established in *Woolmington's Case* [1935] A.C., at p. 481.

[7] See 61 L.Q.R., p. 380.

[8] My italics.

a matter of construction, the effect of shifting the burden of proof from the prosecution to the defence."

This criticism, it is suggested, rests entirely on the assumption that the rule, as stated, refers to the legal burden of proof. To say that the burden of proof is *altered* (see Brett J. in *Prince* and Lord Goddard in *Harding* v. *Price* (*supra*)) is certainly a pointer that such was the meaning intended. Added weight to this view is lent by reference to the judgment of the Lord Chief Justice in *R.* v. *Cohen* [1951] 1 K.B. 505 where the offence was knowingly harbouring uncustomed goods contrary to the Customs Consolidation Act, 1876, s. 186. Explaining the onus of proof in such a case, Lord Goddard said that where dutiable goods are found in the accused's house, that would establish a prima facie case that he knowingly harboured them.[9] By virtue of section 259 of the same statute the onus of proof is then on the accused to give some explanation of his possession from which a jury might infer that he did not know that duty had not been paid. Lord Goddard continued (at p. 507): "It must be for him to give this explanation because the facts relating thereto must be exclusively within his knowledge. There is, in fact, a shifting of the burden of proof." Used in this connection where, it should be noted, the burden of proof is placed on the defendant by express statutory provision, it is evident that the Lord Chief Justice was referring to the legal burden of proof. If reference is made to the language used by the court in relation to offences where the word "knowingly" is omitted—see, for example, *Reynolds* v. *Austin* (*supra*)—the similarity is evident. It is perhaps not without significance that Lord Goddard in both *Cohen* and *Reynolds* v. *Austin* relied for support on the same passage from Stephen's *Digest*.

This examination of the authorities points to the following conclusions:

(1) Where, as in *R.* v. *Cohen*, the legislature has required the defendant to discharge a certain onus of proof, any reference to the shifting of the burden of proof is concerned with the legal burden of proof.

(2) Where, as in *Reynolds* v. *Austin*, reference is made to the shifting of the burden of proof, if what was intended to be expressed was the shifting of the provisional burden, no occasion exists for criticism. But when it is seen that the language used is not materially different from that used in *R.* v. *Cohen* it is not surprising to find it interpreted as the shifting of the legal burden of proof.

(3) So far as the judgment of Day J. in *Sherras* v. *De Rutzen* or any other judgment is intended to lay down that the absence of the word "knowingly" in an offence ipso facto

[9] See note 8 above.

affects the legal burden of proof, it infringes the well-established rule that the legal burden of proving the guilt of the accused is upon the prosecution and cannot be altered except by *express* statutory provision. There is, therefore, no justification for the introduction or continued application of such a principle.

Such confusion as exists is due to the unfortunate failure of the judges to indicate which particular sense of burden of proof is intended. It is to be hoped that Devlin J.'s expression of doubt as to the accuracy of the rule as stated in *Sherras* v. *De Rutzen* will help in drawing attention to a practice which has nought to commend it.

Degrees of knowledge in Statutory Crimes

Adventurously, Devlin J. next proceeded to list the different degrees of knowledge which, in his opinion, are relevant to consider in statutory crimes involving proof of knowledge on the part of the accused. These degrees he defined as follows (at pp. 288–289):

(1) *Actual knowledge*: Where, because of the impossibility of proving the state of another man's mind, the defendant's knowledge is generally inferred from the nature of the act done.

(2) *Knowledge of the second degree*: Where the defendant has shut his eyes to an obvious means of knowledge. Alternatively, where the defendant deliberately refrains from making inquiries the result of which he does not care to have.

(3) *Constructive knowledge*: Where the defendant merely neglects to make such inquiries as a reasonable and prudent person would make.

According to Devlin J. there is a vast distinction between (2) and (3) above, "the case of shutting the eyes is actual knowledge in the eyes of the law; the case of merely neglecting to make inquiries is not knowledge at all—it comes within the legal conception of constructive knowledge, a conception which, generally speaking, has no place in the criminal law."

Classifications such as this do no harm provided they help to clarify and not to complicate the existing law which, so far as it relates to the Licensing Acts, is hardly satisfactory. To substitute "knowledge of the second degree" for what has consistently been described as "connivance" does not help in any way. On the contrary, by failing to explain that the same state of mind was involved, it merely serves to mislead by suggesting that an additional degree of knowledge, separate from connivance, will suffice. What is clear from the authorities is that a person who deliberately shuts his eyes to an obvious means of knowledge, has sufficient *mens rea* for an offence based on such words as "knowingly," "suffering" or "permitting." Thus, in *Redgate* v.

Haynes (1876) L.R. 1 Q.B. 89, where the charge was suffering gaming on licensed premises,[10] Blackburn J. said of the accused licensee: "... if she purposely abstained from ascertaining whether gaming was going on or not, or, in other words, connived at it, that would be enough to make her liable." Lush J. agreed with this proposition. A similar statement of the law is to be found in the judgment of Lord Coleridge C.J. in *Somerset* v. *Hart* (1884) 12 Q.B.D. 360, at p. 364, where he uses the phrase "wilful blindness" as interchangeable with connivance.

Again, Devlin J.'s use of the phrase "constructive knowledge" to describe the state of mind of a defendant who merely neglects to make inquiries and which, according to the learned judge, in general has no place in the criminal law, is something entirely new. Hitherto, constructive knowledge has been used to describe the state of mind embodied in the word "connivance," as, for example, in *Bosley* v. *Davies* (1875) L.R. 1 Q.B. 84 where Cockburn C.J. said (at p. 88) in relation to the offence of "suffering gaming": "Actual knowledge in the sense of seeing or hearing by the party charged is not necessary, but there must be some circumstances from which it may be inferred that he or his servants had connived at what was going on. Constructive knowledge will supply the place of actual knowledge." This passage was cited, with approval, by Manisty J. in *Bond* v. *Evans* (1888) 21 Q.B.D. 249, at p. 253.

Of greater importance, however, is the question whether a defendant who merely neglects to make inquiries should be considered as having sufficient knowledge in the eyes of the law. In practice it may well prove difficult to distinguish between "connivance" and "neglect," and this difficulty may have prompted Cockburn C.J. in *Bosley* v. *Davies* (*supra*) to state (at p. 87): "A man may be said to 'suffer' a thing to be done if it is done through his negligence," and Mathew J. in *Somerset* v. *Wade* [1894] 1 Q.B. 574 to declare: "... a licensed person cannot be convicted of suffering gaming in the absence of knowledge, or connivance or carelessness on his part." More recently, in *London Computator Ltd.* v. *Seymour* [1944] 2 All E.R. 11, the Divisional Court adopted a strict interpretation of the word "knows" in one of the Defence Regulations, holding that it bore its ordinary meaning and was not to be construed as "ought to have known."

Without a full examination of the cases it would be unwise to express any conclusions on the question; but this much may be said. The degree of knowledge necessary to be proved to establish criminal liability for a statutory offence is one of real practical importance. That there should still be uncertainty as to the correct position, and Devlin J.'s suggested classification makes those

[10] Formerly an offence under the Licensing Act, 1872, s. 17, it is now covered by the Licensing (Consolidation) Act, 1910, s. 79.

doubts more apparent than ever, is one more blot on our criminal law which needs to be investigated.

J. LL. J. EDWARDS.

COMMON MISTAKE

IN its recent judgment in *McRae* v. *Commonwealth Disposals Commission* [1] the High Court of Australia made a singularly significant contribution to the clarification of the common law principles relating to the vexed topic of "mistake" in contract which is the more noteworthy by being handed down at a time before the fire of controversy kindled by Denning L.J. in *Solle* v. *Butcher* [2] has subsided into dying embers. The fact situation bordered on the slightly fantastic. The Commission accepted a tender by the plaintiff for the purchase of a vessel which had been advertised as "an oil tanker on Journaund Reef approximately 100 miles north of Samarai" (New Guinea). There was not at any material time a ship answering that description lying near the location indicated, and it was found that, though fraud could not on the evidence be attributed to the defendants, they were guilty of the "grossest negligence," not having any reasonable ground for the belief that there was such a tanker in existence. They took no steps to verify their assertion, based solely on rumour, that they had a ship to sell, and any "mistake" that existed was induced by their own culpable neglect.

The principal question for decision was whether a valid contract had been made between the parties for breach of which the plaintiff was entitled to damages, at any rate in respect of expenses incurred in fitting out and embarking on a futile salvage expedition. This was contested in reliance on *Couturier* v. *Hastie* which is generally assumed to justify the proposition that "mutual," or rather "common," mistake relating to the existence (or identity) of the subject-matter nullifies consent and therewith *avoids* the agreement. Indeed section 7 of the Sale of Goods Act, 1893, represents a formulation of the *ratio decidendi* of that decision based on this supposition, providing as it does in categorical terms that "where there is a contract for the sale of specific goods, and the goods to the knowledge of the seller have perished at the time when the contract is made, the contract is *void*." This provision was, however, inapplicable to the present case because the goods had never been in existence.

At the trial Webb J. had accepted the defendants' contention that the agreement was void for mutual mistake, but this decision was reversed on the present appeal. The court, in its principal judgment delivered by Dixon and Fullagar JJ. and prepared by the

[1] Not yet fully reported; see 25 A.L.J. 425. The writer is indebted for a transcript to the Att.-Gen.'s Dept., Canberra.
[2] [1950] 1 K.B. 671.

latter, carefully re-examined *Couturier* v. *Hastie* and came to the conclusion that it does not support the proposition for which it is generally cited. In the first place, as the case was concerned with an action by the seller for the price of goods which he was unable to deliver, the issue was in no way dependent on a decision as to the validity of the contract. Indeed, the action would probably never have been brought, and certainly not reported, if there had not been the complicating factor that, on the construction of the contract, there was room for the argument that "the purchaser had bought the cargo if it existed at the date of the contract, but that, if it had been damaged or lost, he bought the benefit of the insurance but no more."[3] It was on this question that the Exchequer Chamber[4] and the House of Lords[5] differed from the majority of the court below[6] and restored the verdict for the defendants. Secondly, certain passages in the judgment by Coleridge J. in the Exchequer Chamber which seem at first reading to lend a semblance of support for the view that the contract was regarded as "invalid" or having "failed" appear, in their context, to mean no more than that the principal subject-matter of the contract was a cargo of corn and not shipping documents representing non-existing goods, that the *consideration* to the purchaser had *failed* and that he could not therefore be held liable to pay the purchase price. Similarly, in the other cases of this type-situation, like *Gomperts* v. *Bartlett*,[7] *Gurney* v. *Womersley*[8] and *Strickland* v. *Turner*[9] (with the exception of *Scott* v. *Coulson*[9a] where relief was granted on equitable grounds) the decision was simply that the purchaser could recover the money paid by him in an action for money had and received on the ground of failure of consideration. In none of these cases, therefore, was there an action by the buyer for damages for breach of contract in respect of loss suffered through non-delivery of the goods, so as to raise the crucial question whether the agreement was void or not. Had such a claim been advanced, the decision would have depended on a construction of the contract with a view to ascertaining whether both parties had intended the creation of contractual obligations to be subject to an implied condition precedent that the goods were actually in existence.[10]

It is conceived that the primary importance of the judgment under consideration lies in the assertion that prima facie there would be no such implied condition and that, quite to the contrary, the seller must normally be taken to have *promised* that the goods

[3] *per* Parke B., 8 Ex., at p. 55.
[4] 9 Ex. 102.
[5] 5 H.L.C. 673.
[6] 8 Ex. 40.
[7] (1853) 2 E. & B. 849.
[8] (1854) 4 E. & B. 133.
[9] (1852) 7 Ex. 208.
[9a] [1903] 1 Ch. 453; [1903] 2 Ch. 249.
[10] See also *Pollock on Contracts*, 12th ed., p. 294; not cited.

are in existence. This is supported by Martin B.'s direction to the jury and various expressions of view in the judgments of the higher courts in *Couturier* v. *Hastie*. This, it is submitted, is the only approach consistent with our theory of *assumpsit*; for, after all, is it not clear that, if A purports to sell goods to B, both erroneously believing them to belong to A when in truth they are the property of C, the seller will be bound by his promise? Has he not *promised* that they are his to sell? Reverting to the opinion of the High Court, there follows a passage which is worthy of quotation: "When once the common law had made up its mind that a promise supported by consideration ought to be performed, it was inevitable that the theorisings of the civilians about 'mistake' should mean little or nothing to it. On the other hand, the question whether a promisor was excused from performance by existing or supervening impossibility without fault on his part was a practical everyday question of which the common law has been vividly conscious. . . . But here too the common law has generally been true to its theory of simple contract, and it has always regarded the fundamental question as being:—'What did the promisor really promise?' Did he promise to perform his part at all events, or only subject to the mutually contemplated original or continued existence of a particular subject-matter?"

At this point, attention may conveniently be drawn to the *American Restatement* which—rightly, it is submitted—also eschews a formulation of the governing principle in terms of mistake derived from Romanistic reasoning, yet sides in favour of a presumption for the implication of such a term. (*Cf.* section 7, Sale of Goods Act, 1893.) Section 456 provides that, "except where a contrary intention is manifested, a promise imposes no duty if performance of the promise is impossible because of facts existing when the promise is made of which the promisor neither knows *nor has reason to know*." The present commentator confesses to a bias in favour of the High Court formulation, but it will be observed that the italicised qualification in the *Restatement* would no doubt have produced the same conclusion on the instant facts. The court indeed reached what on its chosen premise was, in the light of the circumstances, the inevitable decision that the contract as thus construed included a promise by the Disposals Commission that there was a tanker in the specified location, for the breach of which the plaintiff was entitled to damages.

The judgment, moreover, indicates that, if the view taken of *Couturier* v. *Hastie* was wrong, the present case nonetheless fell outside its ambit because the Commission could not rely on a mistake as avoiding the contract which had been induced by the culpable conduct of its servants who recklessly and without any reasonable ground asserted the existence of a tanker. "A party cannot rely on mutual mistake where that mistake consists of a belief which is, on the one hand, entertained by him without any

reasonable ground, and on the other, deliberately induced by him in the mind of the other party."

The comment may be hazarded that the present decision has vindicated to a substantial degree Denning L.J.'s analysis of earlier authorities in *Solle* v. *Butcher*. It was there said that "once a contract has been made, *i.e.*, once the parties, whatever their inmost state of mind, have to all outward appearances agreed with sufficient certainty in the same terms on the same subject-matter, then the contract is good unless it is set aside for breach of some condition expressed or implied in it. . . . Neither party can rely on his own mistake to say that it was a nullity from the beginning, no matter that it was a mistake which to his mind was fundamental, and no matter that the other party knew he was under a mistake. *A fortiori* if the other party did not know of the mistake but shared it."[11] Quite evidently our courts are seeking an escape from the confusion caused by the unwary reliance on alien doctrine familiarised by Pothier which ill-assorted with the common law emphasis on the meaning of the *promise*. The way is becoming clearer towards explanation of the relevant principles in terms of construction and offer and acceptance rather than within the framework of an independent and spurious category of mistake.

J. G. FLEMING.

AGENCY AND FRAUD

Armstrong v. *Strain* [1951] 1 T.L.R. 856 (Devlin J.) and [1952] 1 All E.R. 139 (C.A.), concerned the so-called "divided element" in fraud; that is, the situation where one agent innocently makes a false statement and the principal or another agent knows the true facts. In these circumstances the Court of Appeal in *London & County Freehold & Leasehold Properties, Ltd.* v. *Berkeley Property Trust* [1936] 2 All E.R. 1039 decided that the statement of the agent might be added to the knowledge of the principal or second agent so as to make the principal liable for deceit. Shortly afterwards Mr. Patrick Devlin (now Devlin J.), then a well-known Junior, wrote a learned article in the *Law Quarterly Review* (58 L.Q.R. 344) in which he subjected the decision to weighty criticism. In 1937, Atkinson J., obviously impressed by Mr. Devlin's arguments, attempted to distinguish the *Berkeley Property* decision by the time-honoured expedient of declaring that it was not necessary for the learned Lord Justices to have gone so far as they did and that they could not have meant it (*Anglo-Scottish Beet Corporation* v. *Spalding U.D.C.* [1937] 3 All E.R. 885). This, of course, was the best that he, in his judicial capacity, could do; Mr. Devlin, exercising on this occasion

[11] [1950] 1 K.B., at p. 692.

the prerogative of the academic writer, had been able roundly to declare the Court of Appeal to be wrong. However, both came to the same conclusion, namely, that the principal could not be guilty of fraud unless knowledge that the statement was being made and knowledge of its falsity were united in the same person; otherwise, two rights, as they said, could not make a wrong.

In *Armstrong* v. *Strain* the same point again came up for decision; as luck would have it before the recently elevated Devlin J. The facts concerned a firm of estate agents, Messrs. Strain, Uren & Co., consisting of Mr. Strain and Mr. Uren. The former, who had retired from active practice, owned a bungalow near Southend, an area notoriously prone to produce settlements because of the heavy clay sub-soil. Mr. Strain's bungalow had suffered severely from this scourge and had already been underpinned three times. In these circumstances he was understandably anxious to dispose of it, and he placed it in his partner's hands for sale. The latter arranged with another firm to co-operate and they introduced a Mr. and Mrs. Armstrong, who offered £2,400, which Strain accepted. Before a formal contract was signed a partner in the second firm, acting as surveyor for a building society, valued it for mortgage purposes at £2,000 and Mr. Uren described it to the plaintiffs as "in very nice condition." Both these agents knew of the last underpinning but not of the two earlier ones. The sale was completed and within a few months the bungalow collapsed completely and finally. The Armstrongs then sued all three for deceit.

Devlin J. acquitted both agents of any conscious falsehoods and decided that it was not proved that Strain had deliberately kept them in ignorance of the truth in the expectation that they would unwittingly make false statements. Nevertheless the case against the principal, Strain, appeared to be on all fours with that against the defendants in the *Berkeley Property Case* and the learned judge expressly and convincingly declared that it was not possible to distinguish it as Atkinson J. had sought to do. But the industry of counsel, and, one suspects, the retentive memory of his Lordship, unearthed another decision of the Court of Appeal, heard at the height of the war, in which the *Berkeley Case* was not cited, and in which a contrary decision appears to have been reached. This was *Gordon Hill Trust* v. *Segall* [1941] 2 All E.R. 379, which everyone seems to have overlooked—certainly it escaped the vigilance of the learned editor of the new edition of Bowstead's *Law of Agency*. Nevertheless there it was, and it enabled Devlin J. to declare that he was faced with two conflicting decisions of the Court of Appeal between which he had to choose in accordance with the rule in *Young* v. *Bristol Aeroplane, Ltd.* [1944] K.B. 718. It need hardly be said that he chose to follow the latter. His reasons are set out in a long and learned judgment

which bears a close resemblance to his *Law Quarterly* article, to which, as he says, "I was (not unnaturally) referred." Hence Mr. Strain escaped, and the unfortunate Armstrongs were left with the ruins of a bungalow, and the burden of a mortgage debt and costs. Their only consolation was an expression of judicial sympathy, coupled with a strong representation that it should be made part of the professional code of estate agents to advise applicants in like circumstances to seek independent professional advice.

At this stage the case was an amusing example of the strange twists occasionally taken by our system of *stare decisis*. Barristers who write law review articles must often dream of overruling an obnoxious decision of the Court of Appeal when they are elevated to the Woolsack, but hardly in their wildest imaginings can they foresee doing so as judges of first instance. That, however, is precisely what Devlin J. succeeded in doing.

Subsequently however the Armstrongs were enabled to take the case to the Court of Appeal (Singleton, Birkett and Romer L.JJ.) which unanimously upheld Devlin J.'s decision, although they saved face by denying that the decisions in *Segall's* and the present case were irreconcilable with the *Berkeley Case*. In their view Atkinson J.'s interpretation of the latter was to be preferred to that of Devlin J. who had been misled by "the somewhat nebulous way in which the judgments in the case are expressed" (*per* Singleton L.J. at p. 141).

The law is therefore declared to be, that a principal is not liable for fraud in respect of his agent's acts unless (a) he intends or knowingly permits the agent to make a false statement, or (b) his agent acting within the actual or apparent scope of his authority makes a statement with knowledge of its falsity or recklessly not caring whether it be true or false; in other words that no one can be held guilty of fraud unless either he or his agent has *mens rea*. No doubt it is right that the stigma of fraud should not lightly attach, but is the result now reached either socially desirable or logically satisfying? The argument adopted is that *no one* can be guilty of fraud unless *someone* has been fraudulent. But is this sound? Surely the logical (and, it may be, the desirable) rule is that no one should be branded as fraudulent unless he himself has been fraudulent. But this, admittedly, is not the rule in English law where it is well established that a principal is liable for the fraudulent acts of the agent acting within his ostensible authority. (*Barwick* v. *English Joint Stock Bank* (1866) L.R. 2 Ex. 259.) Moreover, it is admitted that the act of the agent in making the statement may be attributed to the principal and added to the principal's or another agent's *guilty* knowledge so as to constitute all the elements of actionable deceit. While the liability of the *agent* must obviously depend on whether he has guilty knowledge it is not so clear why the agent's guilt should be decisive as regards the liability of the

principal. Is it a fact that a principal is only liable if his agent has committed a tort actionable against the agent (*Smith* v. *Moss* [1940] 1 All E.R. 469 suggests the contrary)? And if so, how is this satisfied where one agent makes the statement and another has knowledge of the facts making it false and that it is being made? All the judgments agree that the principal is liable in such a case, but the first agent is clearly not, as he has no *mens rea*, and the second agent, it is suggested, is not liable either, as he has not done the *actus reus* (making the statement) and the first agent is not *his* agent. In other, and more authoritative, words, "For myself I cannot see why if the physical acts of several agents may collectively in law be the joint responsibility of the principal, the same principle should not apply to the states of mind" (*per* Slesser L.J. at [1936] 2 All E.R. 1047).

Two further points may be added. First, it is to be hoped that this decision will not provide companies with an unmerited loophole. This possibility was recognised by Singleton L.J. who suggested a possible solution: "Difficulties may arise in a claim against a company which can only speak or act through its agents or officers, but if an officer of a company writes and represents that which is untrue when many other officers of the company know the true facts, it may well be found that he made the representation without belief in its truth or that he made it recklessly, careless whether it was true or false" (at p. 141). Perhaps another safeguard might result from an extension of the principle that the governing body (the board of directors or the like) are not merely agents of the company but are its organs whose acts and states of mind may be regarded as those of the company itself; see, for example the well-known judgment of Haldane L.C. in *Lennards Carrying Co.* v. *Asiatic Petroleum* [1915] A.C. 705 at pp. 718–4, recently followed in another connection in *The Truculent* [1951] 2 All E.R. 968. From this it seems but a short step to a recognition that the acts and knowledge of the various members of the governing body have to be regarded collectively and that the company cannot escape liability for the misstatements of one managing director on the ground that he was ignorant of facts known to another.

Secondly, it is submitted that this decision is a further illustration of the fact that our law is far too strict in apparently denying any remedy, after completion, for misrepresentation in the absence of strict proof of fraud. In this connection it is interesting to note that the plaintiffs' legal advisers did not think it worth while even to plead for rescission on the ground of innocent misrepresentation. Having regard to the recent judicial criticisms of the rule in *Angel* v. *Jay* [1911] 1 K.B. 666 it seems regrettable that they did not put this point to the test. If ever there was a case where equity ought to have intervened this seems to be it.

L. C. B. GOWER.

JOHN DOE—A FOOTNOTE

IN a former note (*ante*, p. 74) it was suggested that the legal advisers of those seeking to circumvent the Gaming Acts need not fear that they are committing contempt of court provided that they do not willingly attempt to mislead the court. It should be added that the Council of the Law Society has now expressed the opinion that "it is professionally improper to seek to obtain payment of such a debt (*scil.*: a gaming debt) by threatening the issue of process, or by issuing a writ, however the statement of claim may be drawn." (*The Law Society's Gazette*, 1952, p. 17.)

J. D. B. MITCHELL.

WHEN IS A LEASE NOT A LEASE?

THE decision in *Errington* v. *Errington* [1952] 1 All E.R. 149, presents features of unusual interest and importance. The facts were simple enough. In 1936 Mr. Errington, Senior, bought a house for his newly married son and daughter-in-law to live in. He paid £250 down and borrowed the remainder of the purchase-price, £500, from a building society on the security of the house. The loan was to be repaid with interest in weekly instalments. The house was in his name, and it was he who incurred the obligation to pay these instalments, and he told his daughter-in-law that the £250 was a present to her and her husband. At the same time he handed the building society book to her with the words: "Don't part with this book. The house will be your property when the mortgage is paid." Thenceforward the daughter-in-law paid the instalments as they fell due. In 1945 Mr. Errington, Senior, died and left the house by will to his widow. She was the plaintiff in the present action for possession of the house. Briefly the question to be decided was whether the defendant had or had not a right to remain in possession as a result of the transaction with her father-in-law just mentioned.

The county court judge held that the action failed. In his view the defendant and her husband had occupied the premises as tenants at will. At the end of thirteen years, therefore, the right of the landlord to sue for possession was statute-barred (Limitation Act, 1939, s. 9 (1)). None of the lords justices in the Court of Appeal agreed with this view, although they dismissed the appeal on other grounds. The essence of a tenancy at will, they held, is that it is terminable by either side at will. A promise such as the present one not to determine the tenancy makes it impossible for the promisor—here Mr. Errington, Senior—to eject the "tenants" (if tenants they be) so long as the instalments are duly paid (*per* Denning L.J. at pp. 153–4).

But having decided that the son and daughter-in-law were not tenants at will, it was necessary for the court to decide what was

their legal position. The period of their right to remain was a vague one of uncertain duration : so long as the instalments were duly paid and until they were all paid off. It is of the essence of a term of years that it should be for a fixed period (*Lace* v. *Chantler* [1944] K.B. 368). Nor was the defendant paying a rent. She was not bound to pay the instalments at all. Not being, then, either a tenant at will or a tenant for years, but having a right to remain in exclusive possession of the premises, what was the defendant's status? Their lordships were of the opinion that in these circumstances she was a licensee.

There is ample authority for the proposition that there can be no lease without a grant of exclusive possession. (*Wilson* v. *Travers* [1901] 1 Ch. 578, 581; *Taylor* v. *Caldwell* (1863) 8 B. & S. 826, 832, *per* Blackburn J.) This is not to say that whenever there is a grant of exclusive possession, there is necessarily a lease, rather than a licence. But Lawrance J. evidently thought pretty strongly that this was so for he said in *Lynes* v. *Snaith* [1899] 1 Q.B. 486: "the admissions state that she was in exclusive possession—a fact which is wholly inconsistent with her having been a mere licensee."

Amphlett B., however, had earlier contemplated a licensee who had exclusive occupation rights. He said, "it appears to be settled that a mere licensee is not liable to be rated, unless he has the sole and exclusive occupation" (*L. & N. W. Ry.* v. *Buckmaster* (1875) L.R. 10 Q.B. 444, 445). While exclusive occupation for rating purposes may possibly be different from exclusive possession for lease-or-licence purposes, it seems odd that this remark was not referred to in *Errington*. All the cases cited by Denning L.J. in support of his view that *Lynes* v. *Snaith* was wrongly decided are extremely modern. None is earlier than 1942, although he also mentioned a judgment by Lord Abinger C.B. in *Howard* v. *Shaw* (1841) 8 M. & W. 118, 122. This dealt with a purchaser occupying premises before completion. Lord Abinger thought that he could not be considered as a tenant. His brethren thought, however, that he was a tenant at will.

The modernity of these cases makes one wonder whether we are not in the presence of that exceptional phenomenon—a new right in land not created by statute. Denning L.J. tells us that "the difference between a tenancy and a licence is . . . that in a tenancy an interest passes in the land, whereas in a licence it does not." It is most respectfully suggested that this comes a little near to the *circulus inextricabilis* for if we ask what the consequence is of the difference between a lease and a licence we shall be told—as we were told by Vaughan C.J. in a case Denning L.J. himself quotes (*Thomas* v. *Sorrell* (1678) Vaugh. 330, 351)—that the consequence is that the licensee unlike the tenant acquires no interest in the land.

We must therefore consider what are the essential differences between a lease and an irrevocable licence exclusively to possess. That the licence in a case such as the present one is irrevocable

cannot really be doubted after the speeches in *Winter Garden Theatre* v. *Millennium Productions, Ltd.* [1948] A.C. 178. One obvious difference is that such a licence will not prevail against a bona fide purchaser for value of the legal estate. This must be so both on principle and under Law of Property Act, 1925, s. 1. But Denning L.J. himself assures us that such a licence will prevail against anyone else and not merely the contracting licensor (at p. 155). It is therefore apparently not a mere *jus in personam* but as much a *jus in rem* as any equitable interest in land. It was tempting to write " any *other* equitable interest," but we are told that the right of the licensee is not an interest in land (*per* Denning L.J. *cit. supra*). Here, then, is a person who has no interest in land but whose " contractual " right to exclusive possession will prevail against all comers save " equity's darling " in exactly the same way that an equitable interest in land would do. This recalls the remarkably similar development, whereby a restrictive covenant, originally actionable in equity on a contractual basis (*Tulk* v. *Moxhay* (1848) 2 Ph. 774), has now become to all practical intents and purposes an equitable easement, *i.e.*, an interest in the land (*Re Nisbet* and *Potts' Contract* [1906] 1 Ch. 386). This view may be traced back to 1882 (*London & S. W. Ry.* v. *Gomm*, 20 Ch.D. 562, 583, *per* Jessel M.R.).

A licence giving exclusive possession is not, it appears, an equitable lease, but it is remarkably like it in practical effect. It does not necessarily cease to be a licence and become a lease even if the licensee pays rent (*Marcroft Wagons, Ltd.* v. *Smith* [1951] 2 All E.R. 271). Nor do the words in which the parties have chosen to express their relationship necessarily indicate whether a lease or licence is created (*Booker* v. *Palmer* [1942] 2 All E.R. 674, *per* Lord Greene M.R. at p. 677). All that matters is whether they intended to create an interest in land or not. If " all that was intended was that the occupier should be granted a personal privilege with no interest in the land, he will be held only to be a licensee " (*per* Denning L.J. at p. 155). Yet how many lay parties, we may wonder, stop to consider whether they are giving an interest in land or something which, while not theoretically an interest in land, gives the same practical result in an irrevocable right to exclusive possession? Can we imagine young Mrs. Errington asking her father-in-law, " Are you giving me an interest in the land or not? "

Denning L.J., however, gives us in passing, another possible test between leases and licences, when he says " they had a mere personal privilege to remain there, with no right to assign or sublet." Unless every lease with an absolute covenant against assigning or subletting—a common enough covenant—is not a lease but a licence, this test, it is respectfully suggested, is no more helpful than the others. Minor points of difference are that a lease with such a covenant may pass to the personal representatives or trustee in bankruptcy of the tenant. A licence presumably does not. It

seems, therefore, far from easy to draw the line between a lease and a licence. Yet somehow or other it must be done. The rent acts do not apply to a licence while they do to a lease (*Rogers* v. *Hyde* [1951] 2 K.B. 928). Presumably no note or memorandum in writing is necessary under section 40 or section 54 of the Law of Property Act, 1925, as no interest in land is created, on the creation of a licence. A licence to occupy a house rent-free for life differs in its effect from the ordinary tenancy at will, the former excluding the danger of the Limitation Acts (*Foster* v. *Robinson* [1950] 2 All E.R. 342). Yet these important practical consequences of the difference between a lease and a licence depend on the supposititious intent of the parties to create or not to create an interest in the land. The old test depending on whether exclusive possession was, or was not, given had at least the merit of clarity and definition. Is it really too late to return to it? If so, it is to be hoped that some real alternative test will be provided by the courts.

The new right of exclusive possession under an irrevocable licence has both advantages and disadvantages compared with a true lease:

1. It escapes the Rent Acts. Why should not landlords in future only grant licences and not leases? They could follow *Errington* in imposing no obligation on the licensee to pay a rent, but providing that if certain payments are not made, the licence shall come to an end. There would apparently be no equitable relief against such a forfeiture (*semble*, *per* Somervell L.J. at p. 152–8).
2. Assignment and sub-leasing are impossible. Few landlords would quarrel with that!
3. It does not prevail against a bona fide purchaser for value of the legal estate. Let the licensees worry! Perhaps the turn of the landlords—now called licensors—has come at last.

C. d'O. FARRAN.

FACTORIES ACT, 1937, AND ITS REGULATIONS

Benn v. *Kamm* [1952] 1 T.L.R. 57 involved one of the more difficult legal problems arising out of the general scheme of the Factories Act, 1937, namely, the extent to which regulations made by the Secretary of State under section 60 (re-enacting substantially sections 79, 82 (1) and 88 of the Factory and Workshop Act, 1901) affect the duty to fence securely under section 14 (1) (section 10 of the earlier Act) and the duty to remove dust or fumes under section 47 (1) (section 74). It should be added parenthetically that, by section 159 of the 1937 Act, regulations made under the 1901 Act "... continue in force and ... have effect as though ... made or given under [the 1937] Act."

With the decision in *Benn* v. *Kamm*, it may be said that, up to the present, the relationships with which the courts have

had to contend have been those between section 14 (1) and the Woodworking Machinery Regulations, 1922, section 14 (1) and the Horizontal Milling Machines Regulations, 1928, and section 47 (1) and the Grinding of Metal (Miscellaneous Industries) Regulations, 1925. For this purpose, the substantial difference between sections 14 and 47 is that the former imposes an absolute ("shall be securely fenced") duty, the latter a qualified ("all practicable measures") duty; the points of distinction, for this purpose, among the Regulations are that the Milling Regulations contain a list of exemptions and the proviso "that these exemptions shall not prejudice the application of [section 14 of the Factories Act, 1937] in regard to fencing of such machinery," the Grinding Regulations contain exemptions but no saving proviso, whilst the Woodworking Regulations have neither exemptions nor proviso.

The Woodworking Regulations prescribe (inter alia) a certain form of fencing for circular saws. In *Miller* v. *Boothman* [1944] K.B. 837, a workman was injured in operating a circular saw, the fencing of which complied with the regulations but not with the absolute duty under section 14 (1). The Court of Appeal held that the regulations "modified" section 14 (1) by "substituting the prescribed guarding and fencing for the absolutely secure fencing which the section would otherwise require" (841). "The object of the legislature in giving power to the Secretary . . . to modify the . . . Act . . . would seem to be that it was recognised that there are some machines necessary for modern industry that cannot be completely fenced if they are to be used, and circular and band saws afford good illustrations" (840). The Court of Appeal in *Miller* v. *Boothman* nowhere suggested that the regulations had repealed section 14 (1) in regard to woodworking machines. "Modification" was the word emphasised. In *Nickolls* v. *Austin* [1945] K.B. 50, the employee, while operating a circular saw, was injured by a piece of wood flying back out of the machine, which was fenced in accordance with the regulations. The regulations did not provide for such a situation. The Court of Appeal held that, for woodworking purposes, the regulations had repealed and replaced section 14 (1). This, the court considered, was the ratio in *Miller's Case*. No statutory duty had, therefore, been broken by the employer. In affirming the Court of Appeal's order on other grounds, the House of Lords, [1946] A.C. 498, expressly and unanimously reserved *Miller's Case* (*semble*, as interpreted in *Nickolls*) for future consideration.

In *Franklin* v. *The Gramophone Co. Ltd.* [1948] 1 K.B. 542, the Court of Appeal adopted the same interpretation of *Miller's Case* as in *Nickolls*, though a sentence from the judgment of Scott L.J. (who sat also in *Miller's Case*) is noteworthy: "The decision . . . in *Miller* . . . was based upon nearly comparable considerations; and we then took the same kind of view, namely, that the particular provisions of the regulations then in question

were substituted for the general provisions, however unqualified the section of the Act, *at any rate to the extent of modifying one similarly absolute provision of the Act*" (552).[1] The situation in *Franklin* threw up a *casus omissus* of the Grinding Regulations. The dependants of the workman, who died of the dust he inhaled from nearby grinding wheels, succeeded on common law grounds because, the present line of cases has held, the Factories Act Regulations in no way affect the residual and supplementary common law duty of an employer to take care for the safety of his employees. Their claim for breach of statutory duty, on the other hand, failed because the regulations had, within the general scope of their subject-matter, repealed section 47 (1), so that the *casus omissus* was not the subject of statutory provision. The absence of a saving proviso to the exemptions list like that in the Milling Regulations clearly weighed with Somervell and—*semble*—Evershed L.JJ. (557, 560).

Benn v. *Kamm* dealt with the Milling Regulations. These provide (inter alia) for the fencing of the *cutters* of horizontal milling machines. The fencing of the machine in question complied with the regulations. Further, the machine did *not* fall within the list of exemptions set out in the regulations. Though it is difficult to visualise a machine of any complication from a purely verbal description, it seems plain from the judgment that the workman was injured, not by the cutters but by a different dangerous part of the machine, the danger from which, Parker J. found, might have been neutralised by fixing a practicable, precautionary device (59). However, the learned judge held, although "reluctantly" (61), that no action lay for breach of section 14 (1) of the Act on the ground that, in the light of the presence of a saving proviso to the exemptions only in the regulations and of the authority of *Miller* as well as *Franklin* and *Nickolls*, "the regulations were a self-contained code which was in complete substitution of the corresponding obligations under the Act" (61). The *casus omissus*, consequently, was not covered by any statutory provision. The common law claim failed on the evidence.[2]

From this line of cases, a number of conclusions and arguments emerge that seem worth stating:—

1. There is a certain logical inconsistency in permitting the continued use of the qualified common law duty to afford a remedy in the teeth of a code of statutory rules described as "self-contained." Policy considerations, however, plainly require the existence of the possible remedy at common law. If the Regulations do in law form a self-contained code, it is self-contained within the legislative sphere alone.

[1] Italics added.
[2] The report in [1952] 1 All E.R. 56 is partially defective in that the fate of the common law claim is left unexplained.

2. When read in isolation, the exemptions list with the presence or absence of a saving proviso in the Milling and Grinding Regulations gives great force to the conclusions reached in *Benn* v. *Kamm* and *Franklin*. But the Woodworking Regulations, in which there is neither exemptions list nor proviso, may fairly be suggested as treatable within a different category. In neither *Miller* nor *Nickolls* was the *Franklin-Benn* point of construction taken. The judicial policy underlying the decision in *Miller* simply looked to the strongly empirical basis of industrial legislation and the need to secure practical arrangements in concrete, individual cases. If, as I have respectfully suggested, the Court of Appeal in *Nickolls* extended the ratio of *Miller* by misinterpretation, the resulting conflict [3] between Court of Appeal *rationes* leaves the point in issue open to the election of future courts both of first instance and appeal in relation to the Woodworking Regulations.

3. With regard to the Regulations, generally, the force of the exemptions list and saving proviso is greatly diminished when they are read, not in isolation, but in the combined beam of two additional and, I respectfully think, powerful factors. First, the Factories Act, 1937, s. 60 states that the Secretary may "modify or extend," not abolish or repeal the relevant provisions of the Act. The words "modify or extend" have, I would respectfully submit, been given a technical, unliteral meaning, though their literal meaning is, I respectfully think, clear.[4] If this be so, the judiciary has, in this regard, gratuitously enlarged the powers of the executive. Be that as it may, it is a long-established canon of statutory interpretation that where words have one of two possible meanings, the meaning should be chosen that harmonises with the general intention of the Act. The broad, general purpose of the Factories Act is so far as possible to avoid accidents to factory workers, so far as possible to secure their continued safety rather than provide them with the often empty consolation of monetary compensation, to prevent not merely to cure. The Act is, it is true, a penal statute in the sense that its observance is largely enforced by criminal sanctions against factory occupiers; and so due consideration must be given to the statement of Somervell L.J. in *Franklin* where the learned Lord Justice expressed his agreement (*ibid.*, 558) with what was said by Lord Simonds in *L. & N. E. R.* v. *Berriman* [1946] A.C., 318, regarding the restrictive interpretation of penal rules promulgated under the Railway Employment (Prevention of Accidents) Act, 1900. Against this view, however, may be set, for example, the recent statement of Lord Porter in *Harrison* v. *N. C. B.* [1951] 1 All E.R., 1107: "It was suggested . . . that the Coal Mines Act, 1911, is a measure imposing criminal liability,

[3] This argument is considerably weakened by what may be the *implied* view of the *ratio* in *Miller* taken by the House of Lords in *Nickolls*.

[4] *Cf.* Dr. C. K. Allen's note arising out of *Miller's Case* in *Law and Orders*, Appendix I.

and, therefore, should be interpreted as throwing no greater burden on the employer than its words compel. It has, however, to be remembered that this Act is also a remedial measure passed for the protection of the workman and must, therefore, be read so as to effect its object so far as the wording fairly and reasonably permits." It is to be hoped that when the relationship between the Factories Act and its Regulations comes before the House of Lords for final adjudication, the paramount purpose of this protective industrial legislation will be reaffirmed.

C. Grunfeld.

Safe System of Outside Work

Those who regretted the decision of the House of Lords in *London Graving Dock Co., Ltd.* v. *Horton* [1951] 2 All E.R. 1 with regard to the extent of the duty of an occupier towards invitees will no doubt welcome the recent decision of the Court of Appeal in *Christmas* v. *General Cleaning Contractors, Ltd. and Others* [1952] 1 All E.R. 89, because it shows that, despite the inability to recover from the invitor, the injured invitee may nevertheless be able to recover damages from his employer. If the decision of the Court of Appeal in this case is right, then it indicates a possible avenue of escape from the harsh results of the decision in *Horton's Case*. It may be debatable, however, whether it does not place too heavy a responsibility upon the employer.

The case concerned a window cleaner, employed by General Cleaning Contractors, Ltd., who was sent to clean the windows of the Caledonian Club. While cleaning one of them he fell twenty-nine feet into the basement below and was injured. He brought an action for damages against his employers and the club, and Jones J. held that both the contractors and the club were at fault, and awarded the plaintiff £8,500, the defendants to share the liability equally between them. Each defendant appealed.

The contractors had a standing contract to clean the windows of the club, and the plaintiff had frequently been one of the men sent to do this work. He was an experienced employee, who had been in the service of the firm for twenty years. The window out of which he fell was a tall window, with two sashes, in the library of the club. Although some of the windows elsewhere in the club had proved troublesome and defective, and had been the subject of complaints by the men, there had never been any trouble with the windows of the library. On the day of the accident the plaintiff had first cleaned all he could of the particular window from the inside. Then he got outside to do the rest. He threw up the bottom sash and left it slightly open, and stood on the sill, holding on to the bottom of the top sash with one hand as he cleaned the window with the other. When he pushed the top

sash up further, the bottom sash fell down and dislodged his hand from its grasp of the bottom of the top sash, and he lost his balance and fell. It was found as a fact by the trial judge that the weights in the window were not heavy enough properly to balance the sash.

Two questions had to be considered in the Court of Appeal, and Denning L.J., delivering the principal judgment, dealt with both very carefully. Hodson L.J. and Lloyd-Jacobs J. agreed with the conclusions he reached on both points. The two questions were: (1) Was the club negligent? (2) Were the employers in breach of a common law duty to their employee or negligent? [1]

The first question was answered in the negative, because the relationship of the club to the plaintiff was that of invitor and invitee, and it was considered that the window did not constitute an unusual danger to the window cleaner. As Denning L.J. explained, at p. 41, "windows, which are often quite serviceable for ordinary purposes, may yet have same minor defect, such as rusty screws or worn sash cords, or ill-balanced weights, making them unsuitable for window cleaners to put their trust in. Such defects are, for window cleaners, common, recognisable dangers of everyday experience and cannot be classed as 'unusual.'" The result was to reverse the decision of the trial judge holding the club liable. This part of the decision will be as welcome to householders and other occupiers of premises as the other part will be disliked by window-cleaning firms.

The second question concerned the plaintiff's claim against the employers. Although Denning L.J. was not very explicit as to the nature of this claim, Hodson L.J. states, at p. 42, that it was "on the grounds that either in breach of their duty to him they have failed to take reasonable care to provide a safe system of work or they were negligent so that he sustained injury." This claim was upheld, and the reason for this is given in Lord Justice Denning's judgment. Put briefly, it is this: since it was no part of the duty of the club to protect the employee of the window-cleaning firm from the dangers of the job, it must have been part of the duty of his employers to do so. "They are dangers against which window cleaners must provide their own safeguards." If we accept the position established by *Horton's Case*, and no doubt we must become reconciled to it, then, Denning L.J. argues, "it must follow that it is for the employer, who sends his men to the premises, to take reasonable care to see that the premises are safe for the men or else take proper steps to protect the men from the dangers to which he sends them."

The learned Lord Justice sweeps aside the decision in *Taylor* v. *Sims and Sims* [1942] 2 All E.R. 875, in which Lewis J. held that an employer who sent his men out to work on the premises of other people, over which he had no control, was under no responsibility

[1] This is the way the plaintiff formulated his claim. It was not criticised by the court. It is, however, submitted that this involves a tautology.

for the safety of those premises, and he considers that the duty lying on the employer which he outlined in the sentence quoted above may be implied from the observations of Lord Porter and Lord Normand in *Horton's Case, loc. cit.* p. 5 and p. 11. It is not easy to see how an employer can take care that premises not under his control are "safe for the men," and it is suggested that Lords Porter and Normand would be slightly surprised to find their judgments being regarded as implying the extensive liability here contended for. It is submitted that the decision of the Court of Appeal is more defensible on the narrower ground referred to in the second part of the sentence quoted, namely that it is the duty of the employer to "take proper steps to protect the men from the dangers to which he sends them," which in this context means that he should have provided a safe system of work. This view of the case is borne out by a passage in Lord Justice Denning's judgment at p. 42: "They should have laid out the work more carefully. One way would have been to do the cleaning from a ladder, instead of from a sill. Another way would have been to ask the householder to allow the firm to insert hooks into the brickwork so as to attach a safety belt." It also finds support from the judgment of Hodson L.J.

It may be that the suggestions which Denning L.J. made as to the methods whereby the employers could discharge the duty are impracticable. It was urged on behalf of the employers that they were, and that it is usual for men to clean such windows as these by standing on the sills. The only objection Denning L.J. could see to his suggestions was the extra expense involved, and this he dismissed as an invalid objection. There seems to be some conflict here between what is regarded as reasonable in law and what is regarded as reasonable in practice. Denning L.J. regards the usual methods as negligent, whereas the employers regard the "proper steps" he suggests they ought to take as uneconomic.

Finally, a reflection may be permitted as to the fate of the unlucky Mr. Horton. In the light of *Christmas's Case*, it would appear that his employer could have been sued with better prospect of success than the occupier of the ship for a breach of common law duty. The difficulty would have been to circumvent *Taylor* v. *Sims and Sims, loc. cit. supra*, and the decision of Hilbery J. in *Hodgson* v. *British Arc Welding Co., Ltd. and Others* [1946] 1 All E.R. 95. In the latter case it was held that employers who were sub-contractors were not liable to a workman who was injured when a staging erected by a third party, the main contractor and occupier, collapsed, because they were merely sub-contractors engaged to do specialist work, and were in no way responsible for the scaffolding, the provision of which was the responsibility of the main contractor. It will be remembered that Mr. Horton was employed by a sub-contractor in similar circumstances to these.

One is left wondering whether, now that the liability of main contractors who are occupiers has been limited by *Horton's Case*, the liability of sub-contractors who employed the invitee might in future be regarded as more extensive.

J. E. HALL WILLIAMS

REFLECTIONS ON BEST *v.* SAMUEL FOX, LTD.

IN affirming the decision of Croom-Johnson J. at first instance in *Best* v. *Samuel Fox, Ltd.*,[1] the Court of Appeal has rejected an opportunity of removing a ludicrous anomaly in the English law of torts.

It will be recalled that *Best's Case* involved the question (novel to English law [2]) whether a wife could claim damages, for interference with her consortium, from a defendant whose negligence had rendered her husband incapable of sexual intercourse with her.[3]

Whereas there has been little, if any, judicial or academic consideration in England of a wife's rights for negligent interference with her marital consortium, there is, in the United States, an overwhelming abundance of material on the question.[4] Moreover the Court of Appeal was referred to a recent American case with similar facts where, contrary to the weight of authority, the wife's claim was upheld.[5]

Nevertheless, having carefully examined the roots of tortious actions based on a loss of consortium and thus provided itself with a most effective historical strait-jacket, the court found it impossible to afford a twentieth century remedy for a twentieth century action. In short, *Best's Case* succinctly ". . . illustrates the turmoil excited in the . . . judicial mind by the conflict between ingrained tradition and new-lighted concepts of wide-eyed civilisation." [6]

The initial and crucial difficulty is in defining the nebulous term "consortium" and this task immediately places the inquirer in a thicket of verbal quibbles. There is no doubt that historically the term "consortium" was synonymous with "servitium." [7] The

[1] [1950] 2 All E.R. 798; affirmed [1951] 2 All E.R. 116 (C.A.).

[2] For a discussion of the novelty aspect of the case see Denis Lloyd, 29 Can. Bar Rev. 210.

[3] See earlier note in 14 M.L.R. 84.

[4] *e.g.*, J. E. Hannigan, "Damages Recoverable by Husband for Injuries to Wife" (1916) 16 Col.L.Rev. 122; E. Holbrook, "The Change in the Meaning of Consortium" (1923) 22 Mich.L.R., p. 1; J. Lippman, "The Breakdown of Consortium" (1930) 30 Col.L.Rev. 651; C. M. Draper, "A Wife's Right to Recover for Personal Injuries to Husband" (1933) 6 Rocky Mt.L.Rev. 66. Case notes in 9 N.Y.Univ.L.Q.R., p. 285, and 26 Har.L.R., p. 74.

[5] *Hitaffer* v. *Argonne Co.* (1950) 183 Fed. (2nd) 811; and see D. J. Conroy in (1951) 25 Tulane L.R. 293.

[6] Hannigan, *loc. cit.*, at p. 123.

[7] The master's right to the services of his servant generally arose from status not contract: see Lord Parker in *Admiralty Commissioners* v. *S.S. Amerika* [1917] A.C., at p. 45.

A father's right to sue the seducer of his daughter is firmly based on a master and servant relationship: Clerk & Lindsell, *Torts*, 10th ed., at p. 888.

husband's rights of action for criminal conversation, enticement, and for loss of consortium by the negligent act of a third person, were all based on the concept that the relationship of husband and wife paralleled that of master and servant.[8]

Thus in *Lumley* v. *Gye*,[9] Coleridge J. considered that ". . . a wife is not, as regards her husband, a free agent or separate person, . . . she is rather in the character of a servant." In 1861 Lord Wensleydale in *Lynch* v. *Knight* said,[10]

> "The relation of the husband to the wife is in most respects entirely dissimilar from that of the master to the servant, yet in one respect it has a similar character. The assistance of the wife in the conduct of the household of the husband, and in the education of his children, resembles the service of a hired domestic, tutor or governess. . . . *It is to the protection of such material interests that the law chiefly attends.*"

Consequently, while the courts never *completely* identified the husband and wife relationship with that of master and servant, the analogy was sufficiently close to ensure that the wife never acquired rights similar to the husband for interference with the consortium. In addition there was a procedural difficulty, in that, even assuming that the wife had had any such rights, she would have had to join her husband as plaintiff and he would be entitled to any damages recovered. In other instances equity intervened to avoid common law procedural obstacles placed in the way of a married woman.[11] The absence of any such intervention in connection with loss of consortium tends to suggest that at common law it was the absence of any rights rather than procedural difficulties which prevented a wife from recovering for interference with the marital consortium.[12]

The gradual emancipation of married women in all branches of law[13] necessitated a revolution in judicial thought against the old concept of the marriage relationship. Consortium had to be construed as being something more than servitium. Thus the term eventually has come to include other factors : *viz.*,

> "Companionship, love, affection, comfort, mutual services, sexual intercourse—all belong to the married state. Taken together they make up the consortium. . . ."[14]

[8] See Lipman, *loc. cit.*, at pp. 658 and 655, who states that the legal basis for the action of criminal conversation was that "the wife was considered the husband's servant, and anyone who interfered with the right of a master to the services of his servant was liable to him in damages. Therefore the lover who interfered with this service was made to pay. Moreover, the wife was her husband's chattel, at least for the purposes of pleading, and so the action was in trespass."

[9] 2 E. & B. 216, at p. 249.

[10] (1861) 9 H.L.C. 577, at p. 598 (my italics).

[11] *e g.*, the wife's equity to a settlement. See *Snell's Equity*, 23rd ed., at pp 403 *et seq.*

[12] See Holbrook, *loc. cit.*, at p. 8.

[13] As manifested by the Married Women's Property Acts, 1870–1882, superseded by Part 1 of the Law Reform (Married Women and Tortfeasors) Act, 1935.

[14] Birkett L.J. in *Best* v. *Samuel Fox, Ltd.*, C.A., at p. 125.

N.B.—Prosser, *Torts* (1941), at p. 916, etc.: "There has been a gradual

Equipped with such definitions, the courts have been able to extend to the wife those remedies for interference with the marital consortium which were formerly only available to the husband.

Such remedies fall into two classes, dependent on whether or not the interference was intentional (*i.e.*, wilful) or unintentional (*i.e.*, negligent).

Where the interference is intentional, either spouse may now claim damages in tort for enticement,[15] an action first made available to the wife in 1928.[16] Similarly most American states which retain the old English action in tort for "criminal conversation" have extended the remedy to the wife.[16a] In comparison, in England, where the action was replaced by one for damages in the Divorce Division of the High Court,[17] no similar extension has ever been made to enable a wife to recover damages against the adulteress. This is yet another historical anomaly without logical justification in the current law.

On the other hand, if the interference is unintentional (*i.e.*, negligent), then English and American law have long recognised the husband's right to sue for loss of consortium [18] but the wife has, with the exception of the *Hitaffer Case*,[19] been denied an equivalent remedy. This anomaly has been soundly criticised by many leading authorities in the United States.[20] The reason for the present position has been thus stated [21]:

> "At Common Law the wife was never entitled to the services of her husband nor is she entitled to them by statute today. She had the right to all the other incidents of the marital relation equally with her husband, and it is generally settled that she can sue for direct, intentional attacks upon the marital

shift of emphasis away from 'services' and towards a recognition of more intangible elements in the domestic relations, such as companionship and affection. . . . The husband's interest in his relation with his wife first received recognition as a matter of her services to him as a servant. Over a period of some centuries it took form as something considerably broader than this, which was given the name of consortium."

15 The equivalent American tort is called "Alienation of Affections" but like "enticement" in English law, is based on loss of services. There is, of course, no need to prove adultery in an enticement action, *Elliott* v. *Albert* [1934] 1 K.B. 650.

16 *Gray* v. *Gee*, 89 T.L.R. 429.

16a *e.g.*, *Oppenheim* v *Kridel* (1928) 236 N.Y. 156. But American State Legislatures have tended to abolish actions by *either* spouse for criminal conversations and alienation of affections—commonly termed "*heart balm*" actions.

17 Matrimonial Causes Act, 1857, ss. 33 and 59.

18 *Brockbank* v. *Whitehaven Ry.* (1862) 7 H. & N. 884.

19 Note 5, *supra*.

20 (*Inter alios*) Prosser, *loc. cit.*, at p. 948—a passage cited *in extenso* by Clark J. in the *Hitaffer Case*; Harper, *Law of Torts*, 1933, p. 566. Amongst English textbook writers on torts, Winfield, *Law of Tort*, 5th ed., 1950, does not mention the anomaly; Salmond (ed: Stallybrass), *Law of Torts*, 10th ed., 1945, pp. 868–869, states: ". . . there seems no sufficient reason why at the present day such an action should not lie." Clark & Lindsell, *Torts*, 10th ed., 1947, p. 840, makes a scanty reference to the question. N.B. also N. S. Marsh in 67 L.Q.R. 87, at p. 41, who concludes that Mrs. Best ". . . had a strong case in law, the force of which was not fully appreciated by the trial judge."

21 I.E.L. (case-note) 9 N.Y.Univ.L.Q.Rev., at p. 286 (my italics).

> relations, such as for . . . the alienation of her husband's affection (*i.e.*, enticement). But where the marital relation is only indirectly affected by physical injury to a spouse, *loss of services and not impairment of the marital relation is the gist of the action in suits for loss of consortium.*"

To alter the present state of the law one of two methods could be adopted. Either the husband's existing right of action for loss of consortium due to the negligent injury of his wife by a third party should be abolished or a similar right of action should be given to the wife when her husband is so injured.[22] The first method has been adopted in some American states, but there is little to commend this course to English law. In most of such cases the loss of consortium by one spouse through injury to the other causes substantial hardship which is not sufficiently compensated by damages paid to the spouse actually injured. The concrete instance of Mrs. Best is a very striking example of such suffering.

The appeal from the decision of Croom-Johnson J. in *Best's Case* was largely argued on the single point (not pressed at first instance) as to whether or not the wife had a right of action for unintentional interference with the marital consortium through the defendant's negligence to her husband.

The Court of Appeal (Birkett L.J., Cohen L.J. as he then was, and Lord Asquith of Bishopstone) unanimously agreed that the denial of the wife's right was an historical anomaly and Birkett L.J. went so far as to say that

> ". . . today the rights of husband and wife in the consortium are fully mutual and completely equal, and, before the law, the wife is entitled to bring an action when she has been deprived of her consortium by the negligent act of a third person" (*loc. cit.*, p. 124).

Cohen L.J., while agreeing that the law was anomalous, thought

> ". . . it would be an extension of a line of decisions, in itself anomalous, if we were, in such cases as the present, to recognise a right of action in a wife corresponding to that which the courts have recognised as vested in a husband" (p. 126).

Finally, Lord Asquith adopted a strictly conservative and, with respect, an historically accurate view of the law, *viz.*,

> ". . . the husband's right being deeply entrenched in authority and the wife's never having been affirmed, I think that the intervention of the legislature would be needed to produce equity either by abolishing the husband's cause of action or by retaining it and conferring a similar cause of action on the wife" (p. 127).

Thus of the three learned judges, only Birkett L.J. was quite satisfied that the wife, like her husband, *has* a right of action for negligent interference with the consortium. Even so, he found that the wife could not sue in this case since she had only suffered a

[22] In the Court of Appeal in *Best's Case* (*loc. cit.*, at p. 127) Lord Asquith said this was a matter for the legislature.

partial as distinct from a *total* loss of consortium. Mrs. Best complained that the defendant's negligent injury of her husband had deprived her of ever having sexual intercourse with him—but sexual intercourse is only one aspect of the comprehensive term "consortium"—"companionship, love, affection, comfort, mutual services" would continue and ". . . the loss of one element, however grievous it may be . . . (cannot) be regarded as the loss of the consortium within the meaning of the decided cases. . . . Consortium is one and indivisible. The law gives a remedy for its loss, but for nothing short of that" (p. 125).

Likewise Cohen L.J. distinguished between ". . . loss, as distinct from impairment, of that consortium" (p. 125) and Lord Asquith stated, "Consortium is . . . one and indiscerptible. The alternative view, the view that you can disengage a particular strand in the consortial bond and say that, because that strand has been severed, that is enough . . . finds no support in the precedents and leads to insoluble problems in practice" (p. 127).

It is submitted, with respect, that this interpretation of "loss" of consortium is indefensible. As we have seen, the term began its variegated career meaning nothing more than "servitium" and the other strands were added later when the courts began to elaborate on the earlier crude conception of the marriage bond. It is true that the older cases never suggest that an impairment, as distinct from a loss, of consortium would suffice to found the husband's action. On the other hand, at the period when consortium was only considered to consist of one strand, *i.e.*, services, the question of partial loss would not present itself in such an acute form.

The American authority Prosser, after describing the gradual growth of the meaning of consortium and stating that in modern law it includes services, society, sexual intercourse and conjugal affection,[23] concludes [24]

> "The rights of the husband extend to all four; and while it is seldom that the defendant's conduct interferes with only one of them, it now seems clear in nearly all jurisdictions that such *interference with any one will be sufficient as a foundation for the action*. The loss of services, essential at the beginning, no longer is indispensable, and is now only one element upon which the action may be based."

It is submitted therefore that there is no reason why the English courts should adopt this "all or nothing" attitude in such actions.

Lord Asquith also suggested that to allow actions for partial loss of consortium would lead to insoluble problems in practice (p. 127). We would respectfully point out that the courts have not avoided such difficult questions as the assessment of damages to be paid for loss of expectation of life under the Law Reform (Miscellaneous

[23] *cf.* Birkett L J. in *Best's Case*, cited *supra*, note 14.
[24] *loc. cit.*, at p. 917 (my italics).

Provisions) Act, 1934, and the apportionment of damages under the Law Reform (Contributory Negligence) Act, 1945. Surely the valuation of any particular strand of the consortium, while presenting difficulties, is not a matter to be shirked by a modern court.

In an earlier note on *Best's Case*, it was suggested that the Court of Appeal might provide a remedy where none had previously existed. It is regrettable that the Court of Appeal was not as bold as Darling J. who, in 1928,[25] took a firm step forward and granted the wife a remedy against the enticer of her husband. Lord Asquith saw fit to leave to the legislature the simple task of extending to the wife a similar remedy where the interference is unintentional.

It is to be hoped that the matter will appear high on the agenda of a resuscitated Law Revision Committee for,

> "Judges march at times to pitiless conclusions under the prod of a remorseless logic which is supposed to leave them no alternative. They deplore the sacrificial rite. They perform it, none the less, with averted gaze, convinced as they plunge the knife, that they obey the bidding of their office. The victim is offered up to the gods of jurisprudence on the altar of regularity."[26]

ERIC C. E. TODD.

[25] *loc. cit.*, *supra*, note 16.
[26] Cardozo, "The Growth of Law," at p. 66.

REVIEWS

THE QUEST OF JUSTICE. By HAROLD POTTER LL.D. [London: Sweet & Maxwell. 1951. 88 pp. 12s. 6d.]

WHETHER or not one agrees with the views expressed in this small but important book, one must rejoice that they have appeared in print. In an all too literal sense they are Professor Potter's last word on English law, for they are based on three public lectures which he gave in King's College, London, in the Lent Term, 1951, and to which he subsequently made additions, and in the Autumn Term of the same year they were published posthumously. As lectures they represented the realisation of an ambition of many years, and in them may be found a consummation of wisdom drawing its strength from practical experience, from the history of English law and above all from the Christian faith.

Professor Potter took for his theme the very great question of the nature of justice, its relation to law and the means by which it could best be secured. These questions he considers both historically and philosophically. Historically he investigates the quest of justice in four periods of English law which he aptly names the Dawn of Justice (twelfth and thirteenth centuries), the Age of Faith (fifteenth and sixteenth centuries), the Age of Reason (eighteenth century), and the Age of Hope (nineteenth to twentieth centuries). The emphasis in the earliest period on the need for procedural rules for the securing of justice teaches a lesson which is repeated up to the present time. If the Star Chamber in the Age of Faith sought truth through expediency by abandoning accusatorial procedure for its own inquisitorial methods and thus encompassed its own dissolution, the Court of Chancery saved itself in the Commonwealth period by creating a framework of procedure within which its justice was administered. From these various experiments in human justice the author draws what he calls perhaps the greatest lesson, namely, that "try as men may they cannot escape from human fallibility in framing procedure and that, consequently, no matter how perfect the rules of substantive law, injustice will follow in a greater or less degree" (p. 26). Of procedure it can at least be said that it safeguards no less than it hinders the administration of justice.

Justice for Harold Potter meant moral justice and was an absolute conception and one aspect of truth. With the best will in the world, accordingly, one can no more easily attain to the one than the other, but the aim of law and its procedure should be to draw as near as is possible in the nature of things to moral justice, "Passing legal judgment in the course of human activity," the author observed (p. 74, note (*r*)) "often essential to the community, must be distinguished from passing moral judgment."

The author's comments on administrative law, in which he had played an active part for a number of years as Chairman of a Wages Board, are of great interest (pp. 81–86). In them he makes suggestions for delimiting matters of expert opinion and policy from matters of law. His individual recommendations deserve the attention of everyone interested in administrative law.

Harold Potter would be the last person to admit that he was a Natural Law lawyer, but in the brilliant sketch that he has given us in his book he is, in fact, relating law and legal justice to an absolute and extra-legal ethical standard. Nowhere can one find so happy a synthesis of historical jurisprudence and a philosophy of law applied to some of the problems of a modern society. There are, of course, matters which are not likely to receive

with that of Grueber's *Lex Aquilia*. Grueber, writing in 1886, tells us: "The Board of the Faculty of Law in the University of Oxford, being convinced that a more thorough knowledge of Roman Law may be the best means of advancing a scientific understanding and culture of English Law, has recently encouraged candidates in the Final School of Jurisprudence to exhibit a knowledge of some portion of the Digest, and has selected for that purpose the title 'Ad legem Aquiliam' . . ." Professor Lawson says: "this book has been compiled with the same intention as Professor de Zulueta's *Roman Law of Sale*, namely, that of introducing the student, through a detailed study of the Roman Law on a particular topic, 'to a general familiarity with the basic conceptions of most Continental systems, such as an educated English lawyer ought to possess.'" The scope of Professor Lawson's book differs considerably, of course, from Grueber's, for on the one hand "Negligence in the Civil Law" is not confined to Roman Law or damage to property, while on the other hand it is ostensibly confined to negligence. Professor Lawson has, however, generously though reluctantly compromised to the extent of including the whole of the text of Digest IX. 2, on the *Lex Aquilia*, with translation and commentary by way of footnotes, as it is still the practice in some universities to set the whole of a title of the Digest for study. Our students have already found it helpful for this purpose. Acknowledgments are made to previous editors, such as Pernice, Grueber, Monro and Thayer. Although the treatment of Professor Lawson's book differs in several respects from that of Professor de Zulueta's *Roman Law of Sale* (Oxford, 1945), it forms a companion volume to that rather than to Professor Jolowicz's Digest XLVII. 2, *De Furtis* (Cambridge, 1940), which keeps more closely to Roman Law sources.

In addition to Digest IX. 2, with Professor Lawson's illuminating notes, we are given extracts from the other relevant Roman texts, including the Institutes of Gaius and Justinian, other titles of the Digest, *Mosaicarum et Romanarum Legum Collatio*, the Code and the Basilica. Then follow selections from modern codes. As the space devoted to delict in most Continental codes is small, the learned author has been able to include passages from several codes. In any case he would not have thought it sufficient for his purpose to confine himself to the few articles of the French Civil Code, which, though a necessary foundation for the modern law, gives no picture of its present state. Further, as he says, it is interesting to trace the development of doctrine through representative codes of the nineteenth and twentieth centuries. He gives us extracts from the Prussian Code of 1794–1900, which graded negligence in three degrees; the eight relevant articles of the French Civil Code; five sections from the Austrian Civil Code of 1811; a passage on the *Lex Aquilia* and its extensions from Windscheid's *Lehrbuch des Pandektenrechts*, "the finest product of the Pandecktist school," virtually in the form of a code, which shows what use could be made of pure Roman Law in the nineteenth century; selections from the German Civil Code, the revised Swiss Code of Obligations, and the Soviet Civil Code of 1922 as amended to 1948; extracts from the eclectic Mexican Civil Code, to show the goal to which certain modern developments seem to tend; the Swiss Motor Law of 1932; and the Italian Civil Code of 1942, the most up-to-date legislative treatment of responsibility as a whole. The care with which this compilation has been made is illustrated by the fact that the extracts from the Soviet Civil Code, and the references to Soviet Law in the introduction, cover the main points discussed at pp. 859–868 of the third volume of Arminjon, Nolde & Wolff, *Traité de Droit Comparé*, which has since appeared. Texts in the French language have been left untranslated on the assumption that modern law cannot be studied comparatively without some knowledge of French. Difficult terms and phrases, however, are explained in footnotes. Passages from all other languages are accompanied by a translation on the same or the opposite page. Exceptions to this practice are that we are not

given the original of the Prussian Civil Code as it is no longer in force, nor of the Soviet Civil Code: on the other hand the English version of the Quebec Civil Code of 1865 is included as it is of equal authority with the French version.

Case law, as Professor Lawson points out, has been the decisive factor in developing the modern French law of civil responsibility, for the *Code Civil* does not clearly indicate the important boundary between strict liability and liability for fault. He therefore gives us extensive extracts, amounting to 70 pages, from recent French case law, together with the "notes" printed with the reports. He also gives extracts from Professor Paul Esmein's Volume 6 of Planiol et Ripert's *Traité pratique de Droit civil*, which is now out of print; but he has not included extracts from current French treatises, as they should be accessible in a good law library. These extracts are preceded by a lucid account of the structure and procedure of the French civil courts, the form of a French report and the authority attaching to *jurisprudence*. On this last topic the English reader with preconceptions about French law is warned that there has been considerable development in recent years. Thus "we are told that the *Chambre Civile* of the *Cour de Cassation* hardly ever departs from its decisions, at any rate directly. . . . One gets the impression that a decision even of a *Chambre Civile* has almost the authority of the House of Lords." The position of *doctrine* is summarised thus: "the opinions of the jurists, at any rate if they are in agreement, make law, though like the decisions of inferior courts they may easily be overruled by reference to higher authority. In other words *doctrine* ought to, and commonly does, run ahead of *jurisprudence* instead of, as is usually the case in England, behind."

Lack of space excluded English statutes, for example, the Law Reform Acts. In fact it was neither practicable nor necessary to include much English law, as the law of negligence forms a large part of the law of torts and the latter is always a compulsory subject for the English law student. We are, however, given extracts from the instructive Negligence Act and Highway Traffic Act of Ontario, which are not available in most English libraries. These are followed by an authoritative explanation of the Automobile Accident Insurance Legislation of Saskatchewan by Mr. John Green, reprinted from the *Journal of Comparative Legislation*.

The book begins with a concise but comprehensive Introduction of nearly 80 pages, in which the author's breadth of learning and analytical and critical powers are manifest. The Introduction is intended not so much to present a body of doctrine as to furnish the student with an intelligible order in which to read the texts. References are given in footnotes to all the important Latin texts dealing with negligence. Cross-references are here given to the sources contained in the rest of the book, and cross-references are given in the latter to the former, a most convenient system. The earlier sections of the Introduction deal with the *Lex Aquilia*, its relation to earlier legislation and the contents of the first and third chapters of the *Lex*. Professor Lawson seems to adopt Dr. Daube's view that *damnum* in relation to the *Lex Aquilia* means "loss suffered by the owner." As regards the "penalty" for damage covered by c. 3, he discusses the various theories about what the *Lex* originally meant, and adopts Dr. Daube's view that the 30 days were the days after, not before, the wrongful act. Professor Lawson boldly incorporates the latter into his translation of D. IX. 2, 27, 5 (*quanti ea res erit in diebus triginta proximis* "whatever the matter in issue shall turn out to be worth in the next 30 days"); though he translates *si quis alteri damnum fecit* as "if anyone does damage to another" and not, as Dr. Daube's first theory would indicate, "if anyone causes loss to another." The author thinks that *iniuria* originally meant *nullo iure* but gradually came to imply either *dolus* or *culpa*, these terms having, of course, a special meaning when the defendant claimed to have acted *iure*. In the sections on abuse of rights, the medieval and modern

development of a general action and the scope of the action, for which the author has drawn on his "Notes on the History of Tort in the Civil Law" from the *Journal of Comparative Legislation* and his "The Duty of Care in Negligence" from the *Tulane Law Review*, the Introduction moves away from the *Lex Aquilia* and becomes Comparative Law in a wider sense. The legal position of a slave is shown to have enabled the Romans to bridge the gap between damage to property and personal injuries. There is a clear discussion of the confusing problem of *actiones utiles* and *in factum*. It seems that there was no technical difference in the formulary system between *actio utilis* and *actio in factum*, but that Justinian's *actio in factum* is something quite different, *viz.*, a general action for damage done indirectly and without any physical damage to any specific object belonging to the plaintiff. The Romans' dislike of giving an action for a pure omission is also emphasised. Two distinctions emerge, which appear in most modern systems derived from or influenced by Roman Law, *viz.*, between damage caused by a positive act and damage caused by a pure omission, and between physical and purely pecuniary damage. Professor Lawson defends a limited need for the requirement of a duty of care. Even if it coincides with the test of reasonable foreseeability where physical damage is caused by positive act, there may be a liability for causing merely pecuniary damage carelessly, and for these cases it is necessary to show specific duties of care. The discussion passes on to *culpa*, strict liability and causation, attention being drawn to the difficulty of reconciling D. IX. 2, 11, 8; 15, 1, and 51 pr. As regards causation we are told that the Romans had a firm grasp of the significance of an interruption in the chain of causation, though they had the same difficulty as everyone else in deciding whether it had taken place in particular cases; and that no Roman solution helps us to decide how far the chain of causation can for practical purposes be taken to extend where there is no actual interruption by the conscious act of a human being. It is uncertain whether questions of contributory negligence were decided on the basis of the plaintiff's *culpa* or a breach in the chain of causation, but it is presumed that the whole of the damage was borne by one or other of the parties. The section on penalties and measure of damages discusses how the plaintiff's *interesse* came to include *lucrum cessans* and *damnum emergens*. Although the problem of remoteness played a significant part in the imposition of liability, there is only one case in the Roman Law texts where it relates to the extent of the penalty.

Our only regret is that this publication by the Clarendon Press indicates that we shall never have a revised edition of Grueber's over-explanatory and repetitive commentary on the *Lex Aquilia*, which has long been out of print and is difficult to procure second-hand. But if that is the price we have to pay for Professor Lawson's book, we will pay it gladly.

O. HOOD PHILLIPS.

JOINT TORTS AND CONTRIBUTORY NEGLIGENCE. By GLANVILLE L. WILLIAMS LL.D., Professor of Public Law in the University of London. [London: Stevens & Sons. 1 and 558 pp. £8 8s. net.]

IN this new study of concurrent fault Professor Glanville Williams has sought to illuminate some of the dark places in the law remaining after the Acts of 1935 and 1945 which, he claims, "in several respects have not been as well thought out as could have been wished." He has done this by a comprehensive examination of the present state of the law, and a critical analysis of the problems which are the legacy of the recent legislation.

The first part of the work is concerned with joint, or (as the author prefers) concurrent, torts. Once the initial difficulties caused by some new

legal terminology have been overcome, the first chapter presents a valuable and lucid survey of the distinction between joint and several wrongs. In the discussion of the special rules relating to collisions at sea, the confusion caused by the Maritime Conventions Act, 1911, in particular with regard to the principle in the *Milan*, is clearly shown. In the section on contribution under the apportionment legislation the author contends that even intentional wrongdoers should be able to claim relief under the Act. Here one may respectfully disagree—the maxim "*ex turpi causa non oritur actio*" must surely apply to tortfeasors who intend damage to the plaintiff. In such cases it cannot be said to be unjust or capricious that a plaintiff should recover *in solidum* from any one of the several wrongdoers.

Possibly the most important section of this part of the work is the lengthy discussion of the interpretation of the word "liable" in section 6 (1) (*c*) of the 1935 Act. It is interesting to note that Professor Williams establishes, by a new approach to this problem, that contribution may be claimed by a wrongdoer who was in fact not himself liable to the injured party, in other words, that the principle of the *Cairnbahn* may be applied to the interpretation of the Contributory Negligence Act. Here as often elsewhere in the work, comparisons with Canadian case-law help to point a solution to existing problems.

The second part of the work comprises a study of the law relating to contributory negligence, and the author uses as a connecting link between the two parts the modern idea that responsibility should be proportionate to the degree of fault. After considering the scope of the original defence, he turns to the vexed, but now happily academic, problem of the "last opportunity rule." In these chapters, an expansion and modification of an earlier article (9 M.L.R. 105), it is demonstrated that this doctrine was merely "an effort to do rough justice, and there was never any need to state it as a branch of any other department of legal doctrine." It was never, in fact, related to the general principles of causation (*contra* Lord Denman's dissenting judgment in *Radley* v. *L. N. E. Ry.* and Lord Sumner in *Loach's Case*) even through the maxim of "*novus actus intervenions.*" Furthermore, it is claimed that the doctrine of "last opportunity" is, in any event, displaced by the terms of the 1945 Act. The strong words of Denning L.J. in the recent case of *Davies* v. *Swan Motors* are approved.

The treatment in this book of the boundaries of Contributory Negligence has been discussed at length in another place by Lord Wright, and here mention will be made of only two aspects of this subject. In the first place the claim that there is an underlying unity between the doctrine of contributory negligence and the duty to mitigate damages is more than doubtful, in view of the wording of section 1 (1) of the Act of 1945. The second point concerns the maxim "*volenti non fit injuria.*" It is certain that the scope of the Act will be greatly restricted if the doctrine of voluntary assumption of risk is not kept within strict bounds, and the author suggests that (paras. 72–4) so strong has been the modern reaction to the defence of consent that it may now only limit the operation of the Act in cases where there has been "some sort of intercourse or communication between plaintiff and defendant," from which it can be inferred that the plaintiff waives his right of action in respect of the defendant's conduct. This is a far cry from the sturdy individualism of the nineteenth century, and may even be out of earshot of the most recent cases available to the author.

In his discussion of conduct amounting to contributory negligence the author emphasises, in another controversial passage, that negligent conduct in this respect implies no breach of a legal duty. There is no such thing as a self-regarding duty; here again the judgment of the Court of Appeal in *Davies* v. *Swan Motors* is approved.

Such brief mention of some of the more important problems dealt with can do but scanty justice to either the thoroughness or the scope of the work.

In particular, the discussions of the procedural aspects of the new legislation and of the limitations on the field covered by the 1945 Act merit closer attention. The final chapter comprises a draft codifying measure which incorporates some of the suggested amendments to the law, and the completeness of the book is enhanced by three Appendices covering English, Canadian and American apportionment legislation.

G. D. G. HALL.

RUSSELL ON CRIME. Tenth Edition. By J. W. CECIL TURNER. Two Vols.: (1) civ and 1–941 pp.; (2) viii and 942–1961 pp. (with index). [London: Stevens & Sons. 1950. £10 10s. net.]

EVERYONE who has tried his hand at editing one of these very old textbooks will sympathise with Mr. Turner in the task which he was set, to bring *Russell*, which is perhaps the oldest and certainly one of the most intractable of those still surviving, into a fit state to be of real use to the modern lawyer. The book first appeared as long ago as 1819 and its author had had a distinguished career as Chief Justice of Bengal. For its time it was certainly an outstanding work, and it was a time when by modern standards textbooks first became valuable contributions to the service of law. It has in the interval been edited and re-edited by a number of eminent practitioners under whom vast accretions to its bulk have been made and by whom but little of the old wood has been cut out. Mr. Turner is I believe, the first academic student of the criminal law who has undertaken the editorship, and his earlier contributions to this branch of the law have been so distinguished that we naturally look to him for an outstanding piece of work.

The result of his labours is certainly a much improved *Russell*, and if, as is so often the case with a long and detailed review, my subsequent comments give the impression that I am somewhat critical of Mr. Turner's work, I should like to emphasise my appreciation at the outset of the really valuable editorial work which he has accomplished. The very improvements which he has effected seem to me to prove that the book has passed its period of real usefulness to the profession, which ought to be provided with an up-to-date modern textbook on such an important subject. As it is, *Russell* has grown to a quite unmanageable length, with very nearly 2,000 pages; it is nevertheless only a partial treatment of the subject since some of the important modern statutory offences which are technically not misdemeanours, are either not dealt with at all or are only dealt with rather sketchily: the difficult problem of what are "special reasons" for not disqualifying the driver of a motor-vehicle who has been convicted under section 15 of the Road Traffic Act, 1930, being for example dealt with in a short footnote only. Incidentally, since Mr. Turner has now included a section on treason, in addition to providing some material on summary offences, the sub-title of the book, *viz.*, "A Treatise on Felonies and Misdemeanours" ceases to be accurate.

It ought to be quite possible to shorten the length of *Russell* by at least a third without diminishing its usefulness. Mr. Turner has done very little cutting or pruning, for he leaves the copious eighteenth- and early nineteenth-century case digests, which in their day were naturally of great importance, almost untouched, and since he has added a substantial volume of material on the topics in which he is particularly interested, the result is an increase of no fewer than 400 pages, which at the present time it is difficult to justify, especially as it means that the price has had to be raised to a figure which puts the book out of the reach of many lawyers. It should be observed, however, that the increase in size is not in reality so great as the above figure suggests. The print in the new edition is larger and more readable, and the whole format shows a marked improvement.

The greater part of the additional material appears in quite a small number of chapters—particularly those on Criminal Responsibility, Homicide, and Larceny. These are subjects on which Mr. Turner had already made valuable contributions to criminal jurisprudence, and one cannot resist the conclusion that he has given far too much of his attention to these topics, which clearly interest him intensely, to the exclusion of other parts of the subject. The reports of criminal cases show that in recent years the courts have been particularly concerned with such matters as false pretence cases, gaming cases, bigamy, murder, larceny, sexual offences, accomplices, summing up in receiving cases, and like troubles which are all typical of our modern complex civilisation. Apart from murder and larceny this is hardly reflected in the new *Russell*, which, for example, provides only the relevant sections of the Road Traffic Acts together with a few footnotes, and material of a not much more extensive character on gaming offences. It is, no doubt, true that many of the receiving cases are technically to be regarded as procedural; one is nevertheless a little disconcerted to find so many ignored, especially a leading case like *R.* v. *Abramovitch* (1912) 76 J.P. 287.

A great deal of cutting and pruning could be done in some of the chapters which Mr. Turner has left untouched. Do we, for example, really need 10 pages on Blasphemy, 15 pages on Piracy, 11 pages on Slavery, and 11 pages on Buying and Selling Public Offices?

The new edition still lacks a discussion of the general principles of criminal liability, which has always been a conspicuous lacuna in *Russell*, as, indeed, in all the older textbooks on this subject. It is true that Mr. Turner has gone some distance to repair this omission by substantially expanding the chapter on Criminal Responsibility, which had in earlier editions been in reality a chapter on criminal irresponsibility, dealing with infancy, lunacy, and the like. He has introduced a valuable historical discussion of *mens rea* in which he recapitulates views which he has expressed elsewhere, contending that *mens rea* depends on foresight of consequences. There is of course, as Mr. Turner admits, no clear enunciation of this doctrine in the cases, but he argues that it is a necessary deduction from the declared principle that a harmful deed done from inadvertence does not involve the doer in criminal liability, except of course where statute lays down a stricter responsibility. From this he proceeds to a useful elucidation of the meaning of negligence in criminal law, a topic which again occupies his attention in his section on Manslaughter.

Mr. Turner sets out his guiding principle at p. 88 when he says "It is incumbent upon writers, especially in matters of general principle, whenever there appears to be a lack of precision in the authorities to make concrete suggestions for the removal of doubts and difficulties. At the present day the law of homicide seems to elude formulation if nothing more can be done than to collate the words of authority, as set out in the reports of decided cases. In such a predicament it is useless to put the cases and instances in this or that order. The only solution is to decide upon one or more satisfactory general principles and to face the fact that this entails the abandonment of such declarations and dicta as conflict with them." Unfortunately he does not pursue this policy as wholeheartedly as one would like.

The modern doctrine of strict liability in connection with statutory crimes is for practising lawyers, indeed for students, of greater importance than the ancient one. It receives but scanty treatment in this general chapter, not more than a couple of paragraphs. There is no reference here to *R.* v. *Prince* (1875) L.R. 2 C.C.R. 154, and even in the section on abduction there is no real discussion of why a prisoner who bona fide and reasonably believed the girl whom he abducted was over the age of consent should nevertheless have to be held guilty: all that we get is a reference to the discussion of *Prince's Case* in A Modern Approach to Criminal Law. This is not really satisfactory, though it is a procedure followed on a number of occasions in this edition.

After Criminal Responsibility Mr. Turner has concentrated most attention on homicide and larceny. The chapter on Homicide in the old *Russell* was far from scientific, and in a number of ways was unsatisfactory. The new chapter is perhaps the best in the book. The old material is rearranged and new material is brought in. The examination of *mens rea* in respect of murder is particularly valuable, and the general theory advanced in Chapter 2 is elaborated in detail with an intensive examination of the case law. Mr. Turner is at his best here, and although the argument is lengthy it deserves the earnest attention of the profession. In the section on Manslaughter the history does get rather out of hand, running to more than 20 pages of text.

But it is in respect of larceny in particular that one feels that the editor's enthusiasm for the topic has run away with him. This chapter has been much rearranged and rewritten, again with obvious advantage to the work. But it has been expanded by some 70 pages, quite apart from an Appendix of 24 pages on *Ashwell's Case*. Sections which seem quite unnecessarily elaborate are those concerned with theft by bailees and larceny by a trick before 1857, the mental element in larceny before the nineteenth century.

The historical method which Mr. Turner has used with such success in his academic writings is often most illuminating, and is used with conspicuous success on a number of occasions in this edition of *Russell*. An example is the subject of provocation in Homicide. The law in the cases is confused, and cannot properly be understood without appreciating the historical growth. It may perhaps be thought that history is pursued here at the expense of clarity of arrangement; for it is disconcerting to find confession of adultery dealt with under "provocation by words"—"provocation by suspicion or expectation of adultery" being discussed in quite another place. Surely discovery of adultery, which received individual treatment in the earlier editions, is the heart of the matter, but Mr. Turner deals with it in passing as part of his historical survey.

Another useful feature of this edition is the citation of the periodical literature on the subject. Since this is a new departure one cannot expect the references to be exhaustive—some of the most important articles on the M'Naghten Rules for example are not referred to, as "A Century of the M'Naghten Rules" by H. Barnes in 8 C.L.J. at 300. Again Mr. Ellenbogen's essay in the first volume of the *Journal of Criminal Science* on the Principles of the Criminal Law Relating to Insanity might with advantage be referred to in list of articles mentioned at p. 55, as bearing on *R.* v. *McNaghten*. The article by Professor Glanville Williams on "What is a Document?" was incidentally published in Volume 11 of *The Modern Law Review*, not in Volume 2.

Space prevents a detailed discussion of the various chapters and I must content myself with picking out a few points which Mr. Turner might consider against his next edition. Too little attention has been paid to the section on Infancy: the new material from the 1948 Act is rather cursorily inserted, and in a treatise like *Russell* one would expect a more detailed discussion of the dicta in *R.* v. *Williams* [1893] 1 Q.B. 320, relating to the possibility of a child being convicted of an attempt at rape, a point which is also twice repeated without comment in the chapter on Rape.

R. v. *Rivett* (1950) 34 Cr.App.R. 87, is referred to in the Index but not in the text, at any rate on the page given! This case strengthens Mr. Turner's helpful discussion of the distinction between insanity and criminal irresponsibility. Incidentally the form of verdict in insanity might be mentioned.

A somewhat similar slip is made over *Ruse* v. *Read* [1949] 1 All E.R. 398. In dealing with drunkenness Mr. Turner states that "there is no reported decision in England on the question whether drunkenness can be considered as negativing the *animus furandi* in larceny" (p. 66). But *Ruse* v. *Read* is such a case, and in the chapter on Larceny is quoted at some length on that very point (p. 1185).

The subject of the criminal responsibility of corporations is one of great difficulty, and increasing importance. It clearly needs careful and authoritative discussion. Mr. Turner brings in the recent decisions such as *D. P. P.* v. *Kent and Sussex Contractors* [1944] 1 K.B. 146, but otherwise makes no attempt to improve on the unsatisfactory paragraph in the previous edition. Apart from a reference to an article by Sir Roland Burrows in the *Journal of Criminal Science* the periodical literature is not cited.

The modern crime of public mischief which has been before the courts on a number of occasions, and has given rise to much discussion in the profession receives unexpectedly cursory treatment, being referred to only by way of reference to *R.* v. *Manley* (1932) 24 Cr.App.R. 25; as an illustration of misdemeanour in the first chapter.

The peculiar chapter on Robbery and Blackmail has been left unreformed. There is no sufficient similarity between these crimes to justify their treatment in one chapter. Larceny by Intimidation which is dealt with in the next chapter would come more appropriately here. The discussion on blackmail, an important and too common offence, is inadequate, especially in respect of *Thorne* v. *Motor Trades Association* [1937] A.C. 797, which has an important bearing on this subject, and is worth more than a reference in a footnote.

I am indebted to my colleague Mr. J. E. Hall Williams for a number of the points which I have discussed in this review.

C.

PRINCIPLES OF THE COMMON LAW. By A. M. WILSHERE M.A., LL.B., of Gray's Inn, Barrister-at-Law, and BARRY CHEDLOW, of the Middle Temple and the Midland Circuit, Barrister-at-Law. Sixth Edition. [London: Sweet & Maxwell. 1951. xlvii and 846 pp. (with index). £2 12s. net.]

IT is seven years since the last edition of this book appeared, and bringing it up to date must have been a formidable task. The author has been fortunate in having the assistance of Mr. Chedlow, who has been responsible for revising several of the chapters on Commercial Law. The only change in the content of the book is that the section on Evidence has been omitted. In view of the fact that it endeavoured to cover that branch of the law in the space of 88 pages, its omission is no real loss. Apart from this change, we are presented with the mixture as before, except that it is now published in one volume instead of two. The chapters on Commercial Law are just as condensed as ever, while the sections dealing with the general law of contract and tort expound these subjects at considerable length.

This prompts one to speculate on the purpose which the book is designed to serve. One wonders how many students place substantial reliance upon the sections on Contract and Tort for their knowledge of these subjects. The section on Mercantile Contracts covers so much commercial law in such little space that the student is served up with potted law in a highly indigestible state. This section may be of great assistance to students preparing for certain professional examinations, but that can only be a reflection upon the examinations themselves.

In the sections on contract and tort it is reasonable to expect a high standard of exposition, although the same completeness cannot be expected in the more condensed parts of the book. On the whole, this expectation is realised. There are, however, several shortcomings. The *High Trees Case* is referred to at p. 41 without any comment or explanation; *Re Polemis* is referred to only in a footnote in the passage on remoteness of damage in tort (p. 285); the chapter on Master and Servant contains no mention of *Collins* v. *Hertfordshire County Council* [1947] 1 K.B. 598, although the

other "hospital" cases are discussed; in the same chapter *Warren* v. *Henlys* [1948] 2 All E.R. 935 is not included, and the case of *Century Insurance Co.* v. *Northern Ireland Transport Board* [1942] A.C. 509, did not involve the Imperial Smelting Co. (p. 806). Elsewhere, the following cases might well have been noted: *N.U.G.M.W.* v. *Gillian* [1946] 1 K.B. 81 (a trade union can sue in tort); *Russell* v. *Duke of Norfolk* [1949] 1 All E.R. 109 (following *Chapman* v. *Ellesmere*); *Jack Clark (Rainham), Ltd.* v. *Clark* (1946) 62 T.L.R. 705 (concerning the Rule in *Smith* v. *Selwyn*). It is not sufficient to describe slander as defamation "by words only" (p. 425), and opinions will differ as to the desirability of treating *Rylands* v. *Fletcher* liability as a particular species of nuisance. In incorporating statutory changes in law into the text, there is a tendency to reproduce the statutory provisions bare of any comment or explanation. This may be permissible in the more condensed parts of the book: it is surely regrettable in the more expansive sections, and in particular with regard to joint tortfeasors and contributory negligence.

In conclusion, it is only fair to observe that most recent decisions of importance have been noted, and that recent statutory changes have been incorporated into the text where necessary. It would therefore be charitable to overlook the deficiencies, and compliment the editors on the large measure of success which they have achieved in their difficult undertaking.

J. E. Hall Williams.

Gale on Easements. Twelfth Edition by D. H. McMullen M.A., of Lincoln's Inn, Barrister-at-Law. [London: Sweet & Maxwell. 1950. xxxiv and 589 pp. £3 10s. net.]

Eighteen years is a long period to elapse between successive editions of a work as important and authoritative as *Gale*. Fortunately there have been no major developments in the law of easements. Once the present editor had decided to avoid Town and Country Planning—perhaps a wise decision in the circumstances—he has had to deal with no legislation of major importance, and of the few reported cases not all have been considered worthy of reference.

We should be led to expect that the opportunity afforded by a new edition had been taken for a general revision of the text and in this we shall not on the whole be disappointed. For too long *Gale* has been the repository of some dead law and many moribund cases, interesting no doubt to the historian but out of place in a textbook of living law. Something of this has been pruned away, notably in the section on implied reservation of easements. Other passages have been considerably improved by rewriting, such as the discussion of the effect of changes in the dominant tenement on the uses of rights of way, no doubt under the inspiration of *Todrick* v. *Western National Omnibus*. There is also a completely new section on equitable easements. We may thus congratulate Mr. McMullen on having produced an edition which is a marked improvement on the last.

But much remains to be done. There are still too many old cases. To have eight pages of ancient decisions on implied grant (pp. 108–115) is a convenience to the historian, but no modern lawyer will want to delve deeper than, say, *Polden* v. *Bastard* or *Watts* v. *Kelson*; as Mr. McMullen himself points out (p. 145) "If necessary, . . . former editions can be referred to." Then there is the constant citation of Roman Law. Has not the time come when this valuable old scaffolding can be dispensed with? We would willingly exchange most of it for a discussion of American developments, and especially of the enormous divergence between our laws created by the American acceptance of easements in gross. And *Gale* is still disfigured by the excessive length of its footnotes, a technique suitable no doubt to the *biblia*

abiblia of the medieval glossator and the modern Town Planner, but out of place in an exposition of an organic body of law.

Less immediately obvious, but fundamentally more disturbing is the suspicion that too much raw material has been introduced from generation to generation without being really assimilated. Even the initial problem of the definition of easements has become more obscure by Mr. McMullen's acceptance of the dictum that the category of easements has not closed, so that the practitioner who wishes to know whether his client's right is capable of being an easement is not given that guidance which he is entitled to expect from the standard book on the subject. No doubt the ultimate solution will emerge when it is appreciated that all the so-called "new" easements involve rights of entry, that the "novelty" consists merely in the new purposes for which those rights of entry are granted, and that no new "negative" easements have been, or are likely to be, accepted.

More immediately urgent are the twin problems of the "general words" of section 62 of the Law of Property Act, 1925, and the doctrine of "implied grant." These two aspects of what is occasionally the same problem were frequently confused in the earlier cases, and there are still some lawyers who maintain that the doctrine of implied grant, as between vendor and purchaser, is of no, or of little, importance since 1881. The real significance of each can only be appreciated by deliberate comparison, but in *Gale* there is no comparison, and hardly a cross-reference. To particularise, we would say that this lack of comparison is really the cause—perhaps also the effect—of the inadequate treatment of two vital modern cases, *Long* v. *Gowlett* [1923] 2 Ch. 177, and *Borman* v. *Griffith* [1930] 1 Ch. 493. The first is dealt with in a footnote to the statute, instead of in the text, as it should have been. Successive editors, moreover, have been content merely to reproduce the headnote from *The Law Reports*, and unfortunately that headnote lays nothing like sufficient stress on the *ratio decidendi*—Sargant J.'s insistence that for the section to create a completely new easement there must have been, even during the common ownership, some "diversity of ownership or occupation" of the quasi-dominant tenant, generally (though not necessarily) indicated by the separate possession of a lessee. In this respect, the learned judge was following the line of pre-1882 cases dealt with in pp. 88–97 of *Gale*. This necessity for some diversity of ownership or occupation does not exist in the rules relating to implied grants, though this latter doctrine extends only to continuous and apparent benefits. (We have no time now for the ghost of "reasonable necessity" with which the Court of Appeal has recently frightened us).

Borman v. *Griffith* decides two points. First, it reiterates the rule that section 62 does not apply to contracts, *i.e.*, that it gives no contractual rights. Strangely enough there is no reference to the case on this point in that part of *Gale* which deals with the section. But secondly, it decides that the doctrine of "implied grant" *does* apply to contracts between lessor and intending lessee, and consequently to contracts between vendor and purchaser. In other words, this doctrine has two aspects—it implies terms into the contract, and then—we may now say by consequence—it implies the necessary grant into the ultimate conveyance. This contractual aspect of *Borman* v. *Griffith* has not been appreciated by the editors of *Gale*, yet it is of obvious importance. Apart from its implications as to the basis of the doctrine, it presumably means that a purchaser with this kind of implied contractual right may insist on the conveyance including an express grant. It means also that the circumstances to be taken into account in determining the application of the doctrine are those existing at the time of the contract and not those existing at the time of the conveyance, thus differing from the operation of the general words as interpreted in *Goldberg* v. *Edwards* [1950] 1 Ch. 247. But these are small matters. The vital point is that under the doctrine of implied grant a purchaser will get only those easements to which he has an implied contractual right, whereas from the general words he may well

get an easement to which he has no contractual right whatsoever. Now Mr. Megarry has suggested (*Manual of Real Property*, p. 438) that in this latter case the vendor may have the conveyance rectified. It happens that there seems to be no authority for this proposition save where there is a conflict between the conveyance and the *express* terms of the contract, but we should have expected to find a reference in *Gale* to Mr. Megarry's views on such an important topic. It is also true that a vigilant vendor may insist on restricting the application of the general words by inserting an appropriate clause in the conveyance (as, *e.g.*, in *Re Peek and London School Board* [1898] 2 Ch. 315), but too many vendors are unaware of their danger, and for this some blame must be attributed to the various editors of *Gale* for their failure to appreciate, or at least to emphasise, the legal position. Perhaps this is also the reason why no attempt is usually made to clarify matters by the insertion of some clause in the standard General Conditions of Sale. The Birmingham Law Society's Conditions, for instance, incorporate section 62 into the contract, but this seems to be too hard on the vendor, who cannot be expected to appreciate the relevance of facts known only to him. There is something to be said in favour of giving a contractual right to an intending purchaser or lessee who has himself, as a former lessee, enjoyed the quasi-easement, but the justice of allowing a third person to take advantage of the generosity or ignorance of the vendor is less obvious. In any event, contractual amendments of the law do not excuse the law itself. The time has surely come when the legislature should intervene.

We must make it clear that our sympathies are with Mr. McMullen. To re-edit a classic now over a hundred years old is to undertake a task which must inevitably arouse criticism. And if the law is to live, each generation must write its own textbooks. That is why we would appeal to the publishers, as not the least influential of the trustees of the law, to allow *Gale* to relax into honourable retirement, to give us a completely new work on easements, and to persuade Mr. McMullen to write it.

A. D. HARGREAVES.

PALMER'S COMPANY PRECEDENTS, Part I, General Forms. Sixteenth Edition by HIS HONOUR A. F. TOPHAM K.C., LL.M., Bencher of Lincoln's Inn. [London: Stevens & Sons. 1951. xcviii and 1288 pp. £5 10s.]

A NEW edition of this famous work is an event; particularly as the former edition was published no fewer than 20 years ago. To every practitioner with a company-law practice "the big *Palmer*" (and especially Volume 1) is indispensable, for it is one of the very few practitioners' books which really are practical. Since its first appearance in 1877 it has exercised an influence over the development of company law and practice which is probably unparalleled elsewhere in the whole of English legal literature. Judge Topham had already been responsible for five editions extending over 30 years prior to his recent lamented death, and on this occasion he dispensed with the team of assistants who formerly supported him. The profession owe him a deep debt of gratitude and will be united in regretting that he will be unable to undertake further editions of a book which has now become associated with his name almost equally with that of Francis Palmer.

Many changes have been made in the new edition. The alterations in the law made in 1948 have necessitated extensive additions of new material, and, to keep the volume within reasonable dimensions, notes on elementary matters and the full text of the Act have been omitted. Few will quarrel with this change, although all will not share the view of the editor and publisher that Palmer's *Company Law* ("the little *Palmer*") is the ideal work to be used as a supplement to the larger book. Table A and Extracts from the Stock

Exchange Rules are, happily, still printed, but one regrets the deletion of the various sections of the Finance Acts of particular relevance to companies—it was, in practice, most convenient to have these handily collected. The set-up has also been altered and, undoubtedly, greatly improved. The index too has received attention and the learned editor has succeeded in materially reducing its bulk without impairing its efficiency.

There has been some rearrangement of material and a number of new forms have been included. Particularly welcome are the increased recognition of the importance of the Stock Exchange Regulations (see, for example, pp. 152–155), and the form of Minutes of the Board Meeting in connection with a bonus issue (Form 492). It is suggested that consideration might be given to the possibility of including still further examples of Directors' Resolutions which often require just as careful drafting as Members' Resolutions but for which there are rarely any printed precedents (incidentally Form 492 is not mentioned under "Minutes" in the Index).

Use of this edition has already shown that it is even more valuable than its predecessors. It has, however, stimulated the following minor criticisms which are mentioned in the hope that they may receive consideration for the next edition. In the first place, no hint seems to be dropped of the fact that it is now the almost universal practice not initially to form a public company but to register it as a private company and immediately to convert it. It would certainly be helpful to the practitioner if the advantages of this procedure were explained. It is also felt that greater attention might be paid to the all-important implications of taxation; in this connection the brief reference (at p. 789) to death duties is not merely inadequate but positively misleading in the light of the *Crossman Case* and the Finance Act, 1940. After Form 99 (Agency Agreement for Foreign Country) there should surely be a precedent for an Exclusive Sales Agreement, a much more common type of arrangement with a foreign representative. Finally, it is suggested that the forms of objects clauses might be pruned and modernised. It is unlikely, alas, that any further English companies will be formed to run American Railroads (Form 224), nor does it seem necessary to devote over a page to the objects clauses of a Tramway Company (Form 225)—the comment that "as a result of nationalisation companies of this type will probably be rare in future" is surely an understatement? On the other hand one looks in vain for objects clauses for an air charter company, football pool promoter, or stud farm—to name only three not uncommon examples

But these are indeed small points in a work of this magnitude. The profession will eagerly await the remaining two volumes.

L. C. B. G.

THE RENT ACTS. By R. E. MEGARRY. Sixth Edition. [London: Stevens & Sons. 1951. 611 pp. and Index 22 and Tables lxxvi. £2 10s.]

IN his Preface the author speaks of the book's further loss of "youthful slenderness," perhaps disappearance would be more appropriate, since the book is now one of some 600 pages (including statutes, etc.). This growth is not to be wondered at. Apart from the steady stream of litigation on the topic, which is sufficiently demonstrated by a glance at any volume of law reports, it has been necessary to add in this edition some 40 pages to the Appendices setting out statutes and statutory instruments. The only surprise is that the increase in the text has been kept within modest proportions. That has been achieved by considerable rewriting. New cases and new material have not merely been noted but thoroughly incorporated. That task was all the greater since "new material" includes not only cases decided

since the last edition, but also newly discovered material; so that even the most persistent annotator of the old edition may learn something from the new.

If the quality of slenderness has ceased to have much connection with the book the same cannot be said of youthfulness. The process of rewriting has resulted in this edition in a book which, while it enjoys the comprehensiveness of the old, is markedly easier to follow. In part this is due to new divisions by chapters and subheadings and in part to rearrangement. The first two chapters on the true Rent Restriction Acts, their operation, mode of construction, and the jurisdictions involved give a much clearer picture of the system as a whole as does the treatment of the substantive law of the Act of 1946, in a separate chapter rather than as an excursus in the chapter dealing with excepted tenancies. Those passages dealing with premiums, the nature of the statutory tenancy, the revision of standard rents and mortgages, are specific instances of passages which make clearer reading.

Indeed, if there is any complaint it might be that the present edition, while not neglecting detail, almost makes the system appear intelligent and intelligible. The nature of the legislation ensures that the qualification must remain, but there is perhaps something to be said for the view that reform is more likely to come from confusion than from clear exposition of the law. Practitioners will no doubt be grateful that the author clearly does not share this view and has done his best for the law. A second frivolous comment might be that the book shows that the habit of referring, albeit obliquely, to one's earlier writing as authority for present statements has spread from the Bench to the Bar (see p. 876). Frivolity aside, however, the new Megarry is more than worthy of its predecessors.

J. D. B. MITCHELL.

JACKSON AND GOSSET ON INVESTIGATION OF TITLE. Sixth Edition. By EDMOND H. BODKIN M.A., of Lincoln's Inn, Barrister-at-Law. [London: Stevens & Sons. 1950. lxiv and (index) 57 pp. £2 10s. net.]

WHEREAS 24 years elapsed between the issue of the fourth and fifth editions of this well-known work, it is only four years ago since the fifth edition appeared. The fifth edition saw a change of typographical presentation. The "Requisitions" on Title, one of the main features of the book, a feature on a scale to which no other single volume supplied a parallel, were printed for the first time then in the same type as the text, whereas in the former editions the use of a different type for the Requisitions enabled the illustrative matter to be clearly distinguished from the statements of substantive law, thus greatly facilitating reference. The new edition incorporates the developments and changes in the law associated with the Town and Country Planning Act, 1947, and kindred legislation, while a new section is devoted to the Rent Restriction Acts in summary form preceding the relevant Requisitions. If ever a book in the sphere of conveyancing, apart from the sets of Conveyancing Precedents, fully merits its envisagement as a work of practical utility, *Jackson and Gosset* in its own sphere is unsurpassed, its format and comprehensiveness make it a most valuable companion to the various textbooks and sets of the precedents in the well-established series, and has proved its serviceableness, not only in respect of its repertory of Requisitions but also by reason of its compendious statements of Property Law, as an accessible handbook for the practitioner, both at and when away from chambers or office. Two points again call for notice—one is that in the Analysis and Notes on Title it would be far better to substitute letters of the alphabet for the fictitious names which have been chosen. The other point concerns the tendency nowadays to pass over the full designation, if not the names, of original authors and previous editors. It was a welcome feature of

many of the older textbooks to evince a gratifying *pietas* by mentioning the names of those who originated a book and those who formed links in the tradition of its continuity. The learned editor has again surmounted a task of very considerable complexity with great advantage to those who make use of this essential volume in the Conveyancer's Library.

BERTRAM B. BENAS.

YEARBOOK ON HUMAN RIGHTS FOR 1949. [New York: United Nations. 1951. xvi and 421 pp. 87s. 6d.]

THE fourth volume of the United Nations *Yearbook on Human Rights* differs but little from its predecessors. There are the three usual sections devoted to national legislation, international treaties and agreements, and the activities of the United Nations in so far as they affect human rights. This volume however, introduces a new section concerned with the position in trust territories and the non-self-governing territories, although there is no reference to the position in South-West Africa, despite the fact that the General Assembly was seriously concerned with that territory from 1946 onwards and in 1949 asked the International Court for an advisory opinion on its status.

Of the countries whose national legislation is considered 49 were members of the United Nations, Bolivia, China, Ethiopia, Lebanon, Nicaragua, Panama and Paraguay being notable absentees. Sixteen non-members, including Austria, Bulgaria—in fact the Soviet Union and Eastern Europe are notable for their contributions, many of which relate to nationality or to elections—apparently, unlike the situation in Soviet Russia, it is not illegal for a Bulgarian to marry a foreigner—the two Germanies, Japan, (South) Korea, Liechtenstein—whose sole contribution relates to the Defence of the State Act, 1948—the Saar, and most of the countries whose applications for admission to the United Nations have been rejected.

The report from the United Kingdom details no improvements in the status of human rights, instead there is a most interesting account of "The Writ of Habeas Corpus" prepared by Sir Oscar Dowson. In the same way, many other States who are content with the position concerning human rights within their territory merely subscribe a note on development. Australia is one of these States and has particularly referred to the Commonwealth's educational laws. There is, however, no reference to the operation of the Immigration Acts and the discrimination practised thereunder. The United States report gives an interesting summary of the improvements that have been effected in 1951 through the medium of legislation and judicial decision both on a Federal and a State level, and the value of the President's Committee on Civil Rights is clearly seen from the report. Since 1946 the position of the Negro has gradually improved in the United States. The same, unfortunately, cannot be said of the Union of South Africa. No hint of this, however, appears from the entry on this country in the *Yearbook*. Here there appears an abbreviated version of the Asiatic Land Tenure Amendment Act which gives the impression that the Act is a guarantee of human rights, for "No European shall occupy and no person shall allow any European to occupy any land or any premises in the Province of Natal (other than land or premises in an exempted area) which was not lawfully occupied or is not under section six deemed to have been occupied at the fixed date by a person who is not an Asiatic, and no Asiatic shall occupy and no person shall allow any Asiatic to occupy any such land or premises which was not lawfully occupied or is not so deemed to have been occupied, at the fixed date, by an Asiatic, except under the authority of a permit issued under section eight" (section 4).

The documents included in the *Yearbook* are useful so far as they go. They do not, however, go far enough. Reading them one may easily assume

that everything in the 61 countries contributing is conducive to the promotion of human rights. Too much emphasis is placed on paper rights, and not sufficient on reality. The *Yearbook* could only gain by the inclusion of sections which would almost certainly have to be compiled by the Secretariat, giving details of legislation contrary to human rights, to judicial decisions tending to promote or to derogate from such rights, and providing a bibliography of some of the articles written on the subject during the year under review.

L. C. GREEN.

THE VELPKE BABY HOME TRIAL. Edited by G. BRAND. War Crimes Trials Series, Vol. 7. [London: Hodge. 1950. liv and 856 pp. 18s.]

THE "DOUBLE TENTH" TRIAL. Edited by C. SLEEMAN and S. C. SILKIN. War Crimes Trials Series, Vol. 8. [London: Hodge. 1951. xxxii and 824 pp. 18s.]

A WORLD which has recently seen the release of some of the most notorious and monstrous of the war criminals needs to be reminded of what happened in Germany and the occupied countries during the War. The same is true of the Far East, for with the recent signature of the Japanese Peace Treaty it has become crystal clear that it will not be long before all the Japanese "purge" legislation has itself been purged, and the honorary aryans will become paragons of civilisation and Democracy. Sir David Maxwell Fyfe as general editor is to be congratulated on keeping the issue in the public eye, for only through the medium of the "War Crimes Trials Series" is it possible to obtain a detailed account of these trials, which would otherwise remain hidden in some official file securely tied with red tape.

There is little in the *Velpke Baby Home Trial* that requires comment. The offences charged were as common as any that were perpetrated against "inferior" peoples by the "Master Race." Polish girls working on farms in Germany sometimes became pregnant, but since a pregnant woman could not work as well as one who was not marriage was forbidden to these Polish women. Nevertheless, this did not stop the births, and when the babies were born they were taken from their mothers within a few days of their birth and sent to a home at Velpke. This home was not well run, there were no sanitation or heating, no facilities for looking after babies and the matron had no qualifications. It reads strangely, however, to find the court accepting an allegation that it is a war crime merely to deprive babies of their mothers' milk and to attempt to rear them on artificial feeding. The war crime lay in the surrounding circumstances and the lack of attention and treatment given to the babies, but this had nothing to do with the deprivation of human milk. Similarly, it seems hard to punish a panel doctor who is terribly overworked, who has an immense practice, who is single handed and attends the babies whenever they are brought to him, merely because he knew of the heavy death roll and did not make it his first business to go to the home, even though not called, neglect the rest of his practice and cease to act as a normal panel doctor practising in wartime Germany.

With most of the war crimes trials it is possible to say that despite lax rules of evidence—and the *Velpke Case* is no exception—justice has in the end been done, with the *Velpke Baby Home Trial* this may be true of most of the defendants but it certainly appears as if the unfortunate doctor has been the victim of a gross miscarriage of justice. Even the learned editor does not seem too happy about the trial. Instead of devoting his Introduction to an exposition of the case, he has primarily given a summary of the jurisprudence of the United Nations War Crimes Commission of which he was an official.

Of the *Double Tenth Trial* even less need be said, for the verbatim report of this was made available in 1947 under the imprint of the *Malayan Law Journal*, and that version of the trial was more complete than that now edited by the counsel for the prosecution and the president of the court. This was the first trial of Japanese war criminals and concerned the ill-treatment of civilian prisoners in Changi Jail. The evidence of Japanese torture is revolting, but the examples of human fortitude and loyalty under such treatment tend to relieve the sickening picture.

The trial gets its name from the fact that the events which gave rise to it occurred on October 10 when the Japanese selected a number of the prisoners and accused them of contact with the outside world and organising an attack on shipping in Singapore Harbour. The trial is significant not so much for any rule of law that it brings out, except for the inevitable plea of superior orders, as for the insight it gives of the organisation of the Japanese *Kempei Tai*—military police—and of the ramifications of Japanese psychology.

It is difficult to appreciate why this volume was included in the series in view of the earlier publication, and it is even more difficult to understand why it has been abbreviated. The editors' introductory remarks are mainly concerned with the background in Singapore and the events in Changi Jail which would have come out quite easily if the full report had been published. The only significant comment of a legal character they have seen fit to include is a reference to the fact that no civilian or soldier can plead superior orders to a war crime allegation.

L. C. GREEN.

SOZIOLOGIE DER DEUTSCHEN NACHKRIEGS-KRIMINALITÄT. By KARL S. BADER. [Tübingen: J. C. B. Mohr (Paul Siebeck). 1949. xv and 209 pp. Dm. 9.80.]

To write the history of postwar crime in Germany would have been a formidable undertaking even in the most favourable circumstances. Dr. Bader, Generalstaatsanwalt and Professor at Freiburg i. B., had to embark upon it with only the scantiest material equipment and at a time still too near the events. Criminal statistics were available not for the whole of Germany or even Western Germany but only for police or court districts or towns or *Länder* and only from 1948 for the whole of the British Zone (pp. 10 *et seq.*). There was, therefore, no uniformity or consistency in the collection of the material, and even in important matters, such as the age distribution of criminals, very little reliable information seems to have existed (pp. 147, 151). Moreover, on account of the restricted jurisdiction of the German criminal courts many offences dealt with by Allied courts did not come to the notice of the German authorities, a factor which, as the author realises, may have made his picture in some respects incomplete or even distorted (pp. 10 and 84). On the other hand, his official position opened him many doors which might have remained closed to an outsider, and with the assistance of material from his own practical work and that of his colleagues in other districts, supplemented by a comprehensive use of Press reports, Dr. Bader has at least succeeded in laying the foundations for the criminological history of a period of unusual interest and perhaps unsurpassed difficulties to the research worker. This does not mean that his methods of research and his findings are throughout beyond criticism. The lack of more comprehensive material may have led him without adequate reasons to treat local statistics as representative of the whole of Western Germany (*e.g.*, p. 76), and the, at the time almost complete, absence of foreign criminological literature in German libraries forces him, for example, to reproduce some English figures from a Swiss newspaper quoted in a German periodical (p. 8, footnote 12).

The author is at pains to dissociate himself from the ideologies and methods of the Nazi régime. He makes no attempt to deny or minimise its moral responsibility in the criminological sphere or elsewhere (*e.g.*, pp. 2, 5, 6, 8, 22, 38, 68, 127, 201), and he regards Germany's postwar criminality, as the war itself, largely as the inevitable outcome of that epoch (pp. 124, 127).

The book is divided into two main parts, the first, in the author's terminology, dealing with the phenomenological, the second with the sociological aspects of the subject, which means that, whereas in the former the actual criminological position is described for each of the more important offences of the German Criminal Code, in the latter an outline is given of the principal causal factors responsible for that position. This division, though perfectly legitimate in theory, inevitably leads to occasional repetitions.

The most conspicuous feature in postwar developments emerging from the author's narrative—a feature not limited to Germany—is the increasing primitivity of crime (pp. 75, 84) which expresses itself in a steep rise in crimes of violence and the cruder forms of sexual offences. In the field of economic crime the same tendency is shown, at least superficially, in the decline of the more sophisticated types of offences such as false pretences and receiving. However, as the author points out, since the place of these two offences has largely been taken by black-marketeering (pp. 90, 108), we are here faced with a transformation rather than a decline.

The second outstanding postwar feature—which again is not peculiar to Germany—is the tendency of new, in normal times not criminally inclined, sections of the population to succumb to the excessive temptations of that period (p. 177).

The weakest parts of the book are the, all-too-brief, psychological chapter and the final part in which the author presents his practical conclusions and proposals for the reform of the German system of criminal justice. They are frankly disappointing. The author's lack of familiarity with experiences abroad leads him to reject off-hand the replacement of the old double-track system of preventive detention by the one-track system of the Criminal Justice Act, 1948, as well as the amalgamation of penal servitude with imprisonment under the same Act, and to make him unduly sceptical of the indeterminate sentence. From the undeniable fact that punishment is, on the whole, of little influence on the movements of criminality he concludes that utilitarian considerations should take second place in the penal system, and although he is against a wholesale stiffening of penalties, his essentially retributive philosophy may easily produce this result (pp. 197 *et seq.*).

Hermann Mannheim.

THE TRIAL OF GERMAN MAJOR WAR CRIMINALS. Part 22. [London: H.M.S.O. 1950. 556 pp. 10s.]

This volume is the last of the Proceedings of the International Military Tribunal sitting at Nuremberg to be published by Her Majesty's Stationery Office, which is to be congratulated on the service it has rendered to international lawyers in making these records available. It is to be hoped that a similar venture will be undertaken in connection with the Tokyo Tribunal.

It is unfortunate that the Attorney-General has allowed his office to become entangled in the "cold war" instead of preserving its function of objectively reproducing a text "taken from the official transcript." The volume contains the concluding speeches on the indicted organisations—the prosecution section has already been published separately—the final statements by the defendants and the judgment. It is perhaps fortunate that the Stationery Office published the judgment as a separate publication as early as 1946, at a time when people were still prepared to talk of the reasonable attitude of the Soviet member of the Tribunal, and to accept his dissenting judgment as

a statement of opinion that might have been rendered by any judge in similar circumstances. Now we are informed in the "blurb" accompanying the final volume of the series that "the dissenting opinion appears as an early foreboding of the 'cold war': it is according to the now familiar pattern, partly based on inaccurately presented or even invented facts. . . . [Therefore] in the interests of historical truth inaccuracies of a substantial nature are indicated in footnotes to the dissenting opinion." These footnotes are both interesting and valuable, but one may question whether an authoritative official report, and not a commentary published as a White Paper, is the correct place for them.

These 22 volumes are only directed to the verbal proceedings, and it is to be hoped that when paper difficulties have eased the Stationery Office will be instructed to issue one or two volumes containing some of the leading documents admitted as evidence. Similarly, an index to the whole series would prove most valuable.

At a time when General Eisenhower is telling us to forgive the Nazis, and Mr. McCloy is releasing condemned war criminals, not because they were innocent but because circumstances have changed, it is as well to be reminded of the Nuremberg Judgment: "The truth remains that War Crimes were committed on a vast scale, never before seen in the history of war. . . . There can be no doubt that the majority of them arose from the Nazi conception of total war. . . . War Crimes were committed when and wherever the Führer and his close associates thought them to be advantageous. They were for the most part the result of cold and criminal calculation (p. 449). . . . The carrying out of this order [for the murder of Soviet prisoners] was the responsibility of the military authorities . . . (p. 452). The territories occupied by Germany were administered in violation of the laws of war. The evidence is quite overwhelming of a systematic rule of violence, brutality, and terror . . . (p. 458). [The members of the General Staff and High Command] have been responsible in large measure for the miseries and suffering that have fallen on millions of men, women and children. They have been a disgrace to the honourable profession of arms. Without their military guidance the aggressive ambitions of Hitler and his fellow-Nazis would have been academic and sterile. The contemporary German militarism flourished briefly with its recent ally, National Socialism, as well as or better than it had in the generations of the past. . . . They actively participated in all these crimes, or sat silent and acquiescent, witnessing the commission of crimes on a scale larger and more shocking than the world has ever had the misfortune to know (p. 484)."

London. L. C. GREEN.

SHIPPING LAW. Second Edition. By LORD CHORLEY, M.A., of the Inner Temple, Barrister-at-Law, formerly Sir Ernest Cassel, Professor of Commercial Law in the University of London, and O. C. GILES LL.M., of Gray's Inn, Barrister-at-Law. [London: Sir Isaac Pitman & Sons, Ltd. 1951. xxvi and 864 pp. 80s.]

WHEN this book was first published in 1947 it filled a conspicuous gap in legal literature. Its value is shown by the fact that a second edition has already been called for, and the opportunity has been taken to rewrite a number of sections in addition to revising the whole of the text and bringing it up to date. The learned authors have contrived to keep the work as simple as possible so as to be comprehensible to students without a thorough legal background. Nevertheless, parts of it (perhaps inevitably) are heavy going for non-legal readers and it is respectfully suggested that, for the next

edition, consideration should be given to the all-important chapter on Contracts of Affreightment which, it is thought, could be made still clearer by rearrangement of the already excellent material.

The publishers are to be congratulated upon maintaining the price at a reasonable figure, but it is unfortunate that they took so long to pass the book through the press; although the Preface is dated March, 1950, the date of publication is as late as May 22, 1951, with the result that a number of important recent cases are omitted.

L. C. B. G.

LEGAL AID. An Introduction to the Working and Provisions of the Legal Aid and Advice Act, 1949. By ERIC SACHS K.C., Recorder of the City of Stoke-on-Trent. With a Foreword by LORD JOWITT. [London: Eyre and Spottiswoode. 1951. xxiv and 466 pp. 30s. net.]

A SIMPLE EXPLANATION OF THE LEGAL AID SCHEME. By DEREK H. HENE M.A., Barrister-at-Law. With a Foreword by SIR NORMAN BIRKETT. (Daily Express Legal Guides No. 1.) [London: Daily Express. 56 pp. 2s. net.]

THE Legal Aid and Advice Act was discussed at length in these pages by Professor L. C. B. Gower (18 M.L.R. 81–87) and the temptation must therefore be resisted of making the appearance of these two works an occasion for reopening the subject at length. Mr. Sachs' manuscript appears to have been completed by February 15, 1951, and by that time, or even by now, there has, of course, not yet been sufficient opportunity for forming any definite views on the working of the scheme even in its truncated present form, nor are there more than a few decisions to deal with. Almost half of his book consists in fact of appendices which set out the full text of the Act with some annotations as well as the principal regulations, schemes, tables and forms relating to legal aid in civil and criminal cases.

Yet, since Mr. Sachs himself played an important part in the preliminary work for this most important new legislation, his Introduction (of 212 pp.), concerned as it is with the origin and scope of the Act, is an informative piece of work, well-considered, vigorously written and by no means uncritical. Of the greatest value, for instance, is the fact that the author has devoted a whole special chapter to the position of the unassisted litigant who, as Mr. Sachs rightly points out, is hardly less closely (though rather negatively) affected by the new Act than his opponent. The additional risks and obligations which he faces when he becomes involved in litigation with an assisted person are formidable, for his chances of recovering costs even if successful appear to be slight. In enumerating the steps which can be taken, both before and after the action has been brought to minimise these risks, Mr. Sachs draws attention inter alia to section 46 of the County Courts Act, 1934. His submission that the right to secure remission to the county court of an action for tort is not affected by the new Act has in the meantime been confirmed by the Court of Appeal in *Burton* v. *Holdsworth* [1951] 2 All E.R. 881.

Mr. Sachs' exposition is in the first place designed for the practitioner, while Mr. Hene's little book has been written, in simple language, to help those who want to find out whether they are likely to get legal aid under the Act and how they should put their case when applying for it. The two books under review are therefore, despite difference of size, complementary, because most of Mr. Hene's book is devoted to a careful and systematic statement of the information which the applicant must provide to the local

committee in the most common types of cases; above all divorce and annulment of marriage. There is added a full list of addresses of local committees to whom the application must be addressed.

H. A. H.

SCHWEIZERISCHES JAHRBUCH FÜR INTERNATIONALES RECHT — ANNUAIRE DE DROIT INTERNATIONAL—HERAUSGEGEBEN VON DER SCHWEIZERISCHEN VEREINIGUNG FÜR INTERNATIONALES RECHT. Vol. 6. 1949. [Zürich: Polygraphischer Verlag. 292 pp. 20 Swiss frs.]

THE *Swiss Yearbook for International Law* has long become not only an indispensable reference work for anybody seriously engaged in research in international law: it has also been for long one of the most helpful publications for those who are engaged in the practice of private and public international law. The present volume, which bears the date of 1949, but was in fact printed late in 1950, continues to maintain the high standard of its predecessors. The documentary part in particular contains a great deal of material which is of vital interest to practitioners. Professor Guggenheim's reports on the development of international law, Professor Gutswiller's notes on Swiss decisions on the conflict of laws as well as Dr. Alexander's summaries of the statements on foreign law by the Federal Department of Justice constitute veritable mines of information. Among the leading articles the present writer was particularly interested in Dr. Bindschedler's sober discussion of the position of Germany in international law. This topic has been widely discussed, but Dr. Bindschedler does not rehash the old arguments: he deals in a most reasonable manner with the problems arising from the Occupation Statute, the formation of the Federal Republic and that of the German Democratic Republic, *i.e.*, his treatment starts where the old controversy has ended. If he has not solved all the puzzles, one cannot be surprised: the situation is unprecedented in history. It belongs to those for which law has not been made, but which themselves make law.

E. J. COHN.

LEHRBUCH DES SACHENRECHTS. By DR. HARRY WESTERMANN, Professor of Law at the University of Münster. [Karlsruhe: Verlag C. F. Müller. 1951. xvi and 676 pp. Price 26 Dm.]

PROFESSOR Westermann has written a handbook of the German law relating to movable and immovable property which deserves high praise for the lucidity of its diction and arrangement. As a students' textbook—notwithstanding its size—it should prove a powerful competitor for other similar works, now on the market, which does not include the third volume of the classic book on the topic by Martin Wolff. Comparative lawyers will be particularly attracted by the extensive references to literature and court decisions and by the instructive discussion of deontological problems. The present reviewer would be inclined to think that the author would do well to amplify the historical notes and to insert references to comparative law in future editions of the work. There can fortunately be little doubt that these will be called for. The author would perhaps also have done well to deal a little more extensively with the legislation of the Allied High Commission as far as it relates to his topic. Military Government Law No. 52 (Control of Property) and Law No. 59 (Restitution of Property to Victims of Nazi Oppression) are briefly mentioned, but one should have thought that they would have deserved a considerably more extensive treatment—both on

account of the legislative conceptions which they incorporate and on account of their importance for legal practice in contemporary Germany. The legislation on agrarian reform (which is also largely Allied legislation) is dealt with more fully. The author is sceptical in regard to the question whether it will really result in solving the problem of the settlement of refugees from the East. It seems likely that this scepticism is only too well-founded.

E. J. COHN.

THE LAW OF MEETINGS. By SEBAG SHAW and DENIS TOWNSEND. Second revised edition. [London: Macdonald & Evans. xxix and 284 pp. 15s. net.]

WE reviewed the first edition of this book in 11 M.L.R. at p. 866, and commended it. The changes which have been made in the present edition are almost entirely those necessitated by the passing of the Companies Act, 1947, though there have also been made a number of small amendments in the chapter relating to local government meetings. We are glad to note that the publishers have not increased the price of the volume.

C.

Books and Publications received:—

LANDLORD AND TENANT. By R. BORREGAARD. Third Edition. [Stevens & Sons. 1951. x and 102 pp. 6s. net.]

THE LAW OF WILLS. By R. CROSS. Second Edition. [Stevens & Sons. 1951. vii and 96 pp. 6s. net.]

KONSTAM'S INCOME TAX. Eleventh Edition. Release 7, December 15, 1951. [London: Stevens & Sons: Sweet & Maxwell.]

THE LAWYER'S COMPANION AND DIARY FOR 1952. Part I. By ERNEST L. BUCK. Part II. By LESLIE C. E. TURNER. [Stevens & Sons; Shaw & Sons, Ltd. xxiv and 166 and 1519 pp. 18s. net.]

THE INDIAN DIGEST, 1946 TO 1952, OF CASES (CIVIL—CRIMINAL—REVENUE) AND STATUTES. By V. V. CHITALEY B.A., LL.B., and S. APPU RAO B.A., B.L. Vols. 1 and 2, Rs. 16 per volume. THE CODE OF CIVIL PROCEDURE. (V of 1908), Fifth (1951) Edition. Vol. III. Rs. 18 per volume. THE INDIAN LIMITATION ACT (IX of 1908), Third (1952) Edition. Vol. I. Rs. 18 per volume. [Nagpur: The All India Reporter, Ltd.]

NOTES ON CHANCERY PRACTICE. By F. G. R. JORDAN. Second Edition. [The Solicitors' Law Stationery Society, Ltd. 1952. 98 pp. 7s. 6d. net.]

A FRENCH-ENGLISH ENGLISH-FRENCH DICTIONARY OF LEGAL WORDS AND PHRASES. By A. W. DALRYMPLE M.A. Second Edition. [Stevens & Sons. 1951. 218 pp. 21s. net. Available separately at 12s. 6d. each.]

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THE
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Volume 15 July 1952 No. 3

LAW AND SOCIAL CHANGE IN CONTEMPORARY BRITAIN *

A most attractive picture of the English Bench was given by Sir John Fortescue, the Chief Justice of the King's Bench from 1442 to 1460. He said of his colleagues of that day—

> "They sit from eight to eleven. They then study the law, read Holy Scripture, or use other contemplation at their pleasure."

Those days are gone. Leisure for contemplation has gone too. As Lord Asquith of Bishopstone said of the work of the Court of Appeal, it is "plain black robes and grinding work." Professor Friedmann's book illustrates the value of time for contemplation when pursuing the profession of the law. It was the enforced exile of Fortescue himself that gave him the opportunity to reflect at leisure on the administration of the law, and thus to add something distinctive to legal literature. The same detached contemplation was exhibited in Professor Friedmann's earlier book, *Legal Theory*, in his analysis of the effect of social changes upon the law, and now, with immense knowledge gained from the legal systems of many countries, and with reforming zeal that stands out from the printed page, he analyses "the function of law and legal institutions in the vastly changed social pattern of contemporary England." Professor Friedmann says of his present work that it is a "preliminary and incomplete attempt to analyse problems which range over the whole field of jurisprudence," and Denning L.J. (who contributes an appreciative Foreword) says that the author "shows that the law is simply a means—albeit an elaborate and uncertain means—by which society works out its purposes." The outstanding virtue of the present book is that it does for the busy practitioners of the law what they are scarcely able to do for themselves—to stand aside and scrutinise the development of the law in relation to the social background. If the law is to accord with man's most imperious and deepest instincts

* *Law and Social Change in Contemporary Britain*. By W. Friedmann. (Stevens & Sons Ltd 37s. 6d. net.)

for what we comprehend by Justice, it is essential that from time to time such scrutiny should take place, and no time could be more opportune than the present. The last 50 years have been years of quite revolutionary changes, and today in England the establishment of what is called the Welfare State calls for an examination of the legal problems that are inextricably intertwined with an era of profound change. Nearly 20 years ago Lord Macmillan said, "Law is something much greater and nobler than the contents of any statute book, of any code, of any volume of judicial decisions. It is the guardian and the vindicator of the two most precious things in the world—justice and liberty."

This book of Professor Friedmann is concerned with the same great theme, although he uses no rhetorical phrases. He discusses decided cases, statutes, and legal writings in the most practical way, and is never unmindful of the difficulties that arise in a Planned State. He brings to the discussion his first-hand knowledge of other systems of law and the quality of a richly stored mind.

The book is divided into four parts, but each part is concerned with changes in some branch of the law, and what those changes portend. The changes of the last 50 years in the law of contract, the law of tort, the law of property and in the criminal law, are analysed in great detail in the first part, because Professor Friedmann believes that a great transformation has taken place in the fundamental institutions of the common law. The reader must be left to discover for himself the fascination of the narrative, but an example may be given to demonstrate the method, and, at the same time, to illustrate the central idea of the whole book. In the section dealing with *Recent Trends in the Law of Torts*, the author traces the development of the law in the field of manufacturer's negligence since *Donoghue* v. *Stevenson* in 1932. He shows how the term "manufacturer" has been given a very wide interpretation; how the word "dangerous" has been stripped of all distinctive meaning; how the use of the maxim *res ipsa loquitur* has increased the burden on the manufacturer as in *Grant* v. *Australian Knitting Mills*, by shifting the burden of proof, in effect, to the defendant; and how the construction of "opportunity of inspection" has been made to mean "reasonable necessity for" and not "physical opportunity of." These, clearly, are very notable changes. In the *Australian Knitting Mills Case*, for example, the plaintiff was unable strictly to prove negligence; the defendants had sold over four million garments of the like kind without any complaint of any sort; yet the manufacturer was held to be under the necessity of showing that a cause outside his sphere of responsibility had intervened. From similar illustrations in various branches of the law, Professor Friedmann is led to the conclusion that a whole series of torts, headed by negligence, and concerned principally with the liability of manufacturers, occupiers of land and other property owners, are slowly but inevitably converging into a general broad

principle of legal responsibility towards the public, flowing from the control of property. His conclusion, therefore, is that *Donoghue* v. *Stevenson* was a provisional attempt to adapt legal responsibilities to new social conditions; and that it cannot remain confined to the manufacturer-consumer relationship.

That adaptation through the whole realm of law is the subject discussed with freshness and vigour throughout these pages, and with the lucidity that comes "from a busy and prolonged acquaintance with the subject on hand" as another Stevenson once said.

This leads him directly to another question that in one form or another keeps breaking in at all stages of the argument, and which he plainly believes to be of surpassing importance, the question of judicial interpretation. Professor Friedmann is a legal reformer, and, it would appear, something of a social reformer too. When the Court of Appeal in 1927 had to deal with a case under the provisions of the Housing Act of 1925, where the lessors of houses below a certain rateable value were under a statutory duty to keep the houses "in all respects reasonably fit for human habitation," the majority decision of the court comes in for quite severe condemnation. A defective sashcord had broken and the plaintiff in consequence injured his hand, but the court said that that did not prevent the house being "reasonably fit," and one of the members of the court went the length of saying that any different view would be "somewhat fantastic." When in 1948 the identical facts came up for consideration again, the House of Lords said the house was *not* reasonably fit, and Professor Friedmann writes with a kind of suppressed indignation of the decision of 1927, and makes two separate references to it. The House of Lords decision is an illustration he says of "adopting the social policy rule in interpreting a statutory rule containing phrases of general social significance." On the other hand, one of the Lords Justices in 1951 is highly commended for his "valiant" attempt to apply the principle of *Donoghue* v. *Stevenson* to the case of negligent preparation of accounts by a firm of chartered accountants, who knew that the plaintiff was relying on their statement to decide whether or not he should invest his money. And Professor Friedmann reserves his highest praise for men like Lord Wright, Lord Atkin, and Sir George Jessel "as having tended to interpret the judicial function as one of active assistance in the progressive development of the law."

Then again, to illustrate his main theme Professor Friedmann shows how the liability of employers to employees has been similarly expanded and extended through the development of common law liabilities by the courts, and by the interpretation of modern statutes. Perhaps the most-quoted case in the courts today, *Wilsons and Clyde Coal Co. Ltd.* v. *English*, is approved by Professor Friedmann on the ground that it left but few cases of accidents arising in the course of industrial employment where the employer was not liable,

once negligence had been found. The narrowing down of the scope of certain legal rules "obnoxious to modern social conscience and public policy" in this field of the law is also approved, as in the instance of the steadily increasing resistance to the defence of *volenti non fit injuria* and the opposition to the rule of common employment.

The second part of the book deals with the role of public law in the English legal system, and discusses the most interesting and important question of the legal position of public corporations, and what Professor Friedmann calls "the characteristically English attempt at blending the public ownership and management of industries and other public services with elements of private law and individual enterprise."

The third part of the book discusses some aspects of statute law in the light of modern developments. This is a particularly valuable part of the book because the statutes of recent years cover immense fields of corporate economic and social activities; and the proper interpretation of these statutes becomes a matter of the very highest legal and social importance. Lord Wright, who in 1937 had written rather disparagingly of this branch of the law, is respectfully challenged; and Professor Friedmann discusses with great learning the various types of "legal approach" and the traditional methods of interpretation in English jurisprudence. He suggests that the vacillation between one type of interpretation and another has been productive of the most unfortunate results in many fields of law, and suggests further that whilst in a free society there is no master solution to resolve judicial difficulties, some assistance may be derived from differentiating the statutes to be construed for the purposes of interpretation, and proceeds to indicate the statutes he has in mind, and the methods of interpretation he suggests should be applied.

The final part of the book is in some respects the most important of all. It deals with the question of how the enormously increased activities of the modern State can be reconciled with the tradition of the common law, and the preservation of those individual rights which are indissolubly bound up with the British tradition.

This book, then, is clearly a most stimulating and provocative study of the law in relation to social changes in Great Britain. No doubt it will give rise to much disputation, because politics, and indeed party politics, enter so largely into the questions of social change. It is not given to everybody to approve the design and building of the Jerusalem set up in England's green and pleasant land. That makes it all the more desirable that this book should be widely read. The days are gone (if ever they existed) when lawyers could say that they lived in a world of their own into which particular social or political trends did not intrude. Whether lawyers like it or not, social and political trends have intruded in the past, and will continue to intrude with growing intensity in

the future. Lawyers cannot emulate Mrs. Partington, though Professor Friedmann seems to think that even the House of Lords cannot boast of a blameless record. When the courts had to deal with the rule of common employment, they formulated a legal policy over the years based on the view that the rule was out of harmony with modern conditions of industrial employment, and out of harmony too with the ideas of social justice which generally prevailed. Therefore, everything was done to limit the scope of the rule until its welcome abolition in 1948. Social and political trends had in fact intruded. "The accepted standards of right conduct," to use the words of Mr. Justice Cardozo, inevitably shape the progress of the law. In the last quarter of a century the shift in judicial opinion in the interpretation of Tax Statutes is most marked, and from condonation of legal attempts to avoid taxation the change has been made to condemnation, as may be seen from comparing the language of Lord Sumner in 1928 with that of Lord Greene in 1942, or that of Lord Simon in 1948. Is this due to a change of social conscience and the acceptance of a different conception of state functions? And is this reflected in the later pronouncements? It would be idle to complain about omissions from this book, when so much has been given, but a discussion of Family Law would have been most welcome in a book devoted to important social changes. Perhaps one may conclude by regretting that the price of the book is as high as 87s. 6d. No doubt it is the best illustration of social change; but many young lawyers will be precluded from buying it, which is a pity, for the idealism and fervour of Professor Friedmann must be an encouragement and inspiration to younger lawyers in particular.

The book ought to be in the library of every lawyer.

NORMAN BIRKETT.[1]

[1] The Rt. Hon. Sir Norman Birkett was appointed a judge of the High Court of Justice in 1941 and a Lord Justice of Appeal in 1950.

LEGISLATURE AND JUDICIARY

Reflections on the Constitutional Issues in South Africa: Part I

Though the judgment of the South African Court of Appeal in the recent case of *Harris and Others* v. *Minister of the Interior* [1] is significant primarily in the law and politics of South Africa, it may be expected to influence the understanding and interpretation of the Statute of Westminster throughout the Commonwealth. Moreover, there is much in the judgment of interest for general jurisprudence and political theory. Very rarely are courts of law required to examine legal principles that may fairly be described as "ultimate"—yet, directly or indirectly, the issues in *Harris' Case* belong to this category. The arguments addressed to the court, the actual decision, and the controversy to which it has given rise, touch and range across the uncertain boundaries that mark off law from politics and history.

Such being the nature of *Harris' Case*, it is probably too early yet to assess its full significance. Certainly, adequate discussion of every major point which was, or has been alleged to be, involved in the litigation is not practicable within the reasonable limits of a law review.[2] Of necessity some selection must be made, and it has seemed to the writer that he may usefully attempt three things. First, to review briefly what the Appeal Court considered to be the real issues, and its decision thereon. This is perhaps more than usually appropriate, because much confusion has been imported by the use, in various contexts, of that slippery and delusive term sovereignty. Thus, it has been said that the decision in *Harris' Case* denies the sovereignty of South Africa as a State, impairs the sovereignty of South Africa's legislature, and thwarts the sovereign will of the South African people. Each of these assertions, in the writer's submission, is unsound; and, in the aggregate, they obscure what the case was really about. To establish this criticism is the second object of this article; and the third is associated with it.

In the argument addressed to the court on behalf of the Minister of the Interior, reliance was placed, by way of analogy, upon a number of propositions concerning the nature of the United Kingdom Parliament and its relationship with the British courts, which

[1] 1952(2) S.A. 428. The case is also reported in [1952] 1 T.L.R. 1245. Comment in this article will be confined to the judgment of the Appeal Court on the Separate Representation of Voters Act, which was given in March, 1952. It is not proposed to discuss the issues in the further litigation now pending between the same parties, which has arisen out of the passing of the "High Court of Parliament Act."

[2] Part of the field has been dealt with in the writer's *Parliamentary Sovereignty and the Entrenched Sections of the South Africa Act*, Juta, 1951.

were said to be implicit in a true view of Parliamentary Sovereignty. These propositions were[3]: (i) that a court of law cannot take any note of the procedure in Parliament whereby a Bill came to be enacted; (ii) that a measure which appears on the Roll of Parliament is good law, whatever the method adopted for its passage; (iii) that a Sovereign Parliament cannot bind itself as to the form of subsequent legislation, and, therefore, the provisions of a later Act, so far as they are inconsistent[4] with an earlier Act, must prevail; and (iv) that a legislature can only rank as sovereign if there is one manner of law-making which the constituent elements of that legislature can always adopt in legislating. Reasons will be given, however, to show why the position in Britain was irrelevant and, in any event, inconclusive.

The law of England received comparatively short treatment in the judgment; for it is hardly the office of judges to expound points which they hold to be irrelevant, however great their intrinsic interest may be. In the pages of this journal, however, ampler discussion may serve a useful purpose; though one may hope to do little more than formulate the main problems in a significant way and suggest the lines along which solutions should be sought.

The Issues in Harris' Case

The Appeal Court was asked in *Harris' Case* to adjudicate upon the validity of a measure known as Act 46 of 1951 (the Separate Representation of Voters Act) which, having been passed by a majority vote in the House of Assembly and in the Senate, sitting separately, received the Governor-General's assent, and was thereafter officially enrolled among the statutes of the Union.[5] This called for a decision upon (a) the nature of the Union Parliament, *i.e.*, its structure, mode of legislating and powers and (b) the relationship between that parliament and the courts.

The actual order made by the court was that "the measure known as Act 46 of 1951 is invalid, null and void, and of no legal force and effect in terms and by virtue of sections 35 and 152 of the South Africa Act, 1909, as amended." The relevant provisions

[3] The writer quotes the first three from the opinion of Professor E. C. S. Wade, published *in extenso* in the *Cape Times* on March 24, 1952. Professor Wade's opinion was taken by the Union Government before the appeal and was released by the Government for publication after the judgment was announced.
Counsel's way of formulating the second proposition was as follows: "If, from the document, it appears that the measure was passed by both Houses and received the Royal Assent as an Act of Parliament, the courts are bound to accept it as an Act of Parliament." At p. 445.

[4] The inconsistency was not admitted in *Harris' Case*; one of the alternative contentions on the Government's side being that Act 46 of 1951 involved no "disqualification" within the meaning of s. 35 of the South Africa Act. But see note 9 below.

[5] The scheme of the "Act" was to destroy the common voters' roll for Europeans and non-Europeans; and to create two new and mutually exclusive rolls, one for Europeans and another for non-Europeans—each class of voters to elect, separately, a number of members of the House of Assembly.

of these sections of the South Africa Act, commonly known as the entrenched sections,[6] provide, in effect, (i) that no law which disqualifies certain persons from enjoying certain franchise rights, on the ground of race or colour only, shall be valid unless passed by a two-thirds majority vote of the total membership of the Senate and of the House of Assembly in joint session—section 35[7]; and (ii) that no amendment or repeal of the two-thirds majority procedure, where in terms of the South Africa Act it is required to be used, shall itself be valid unless passed by that procedure—section 152.[8]

The court had no difficulty in deciding that the Separate Representation of Voters Act provided for the "disqualification" of voters within the meaning of section 35 of the South Africa Act.[9] It held, moreover, that the provisions in sections 35 and 152, prescribing that such a measure should be invalid unless dealt with by

[6] There is another "entrenched section," namely s. 137 of the South Africa Act, which provides for the equality of the two official languages.

[7] s. 35 of the South Africa Act, as amended by s. 44 of Act 12 of 1936 (which dealt with Cape Native voters), is as follows:

"35.—(1) Parliament may by law prescribe the qualifications which shall be necessary to entitle persons to vote at the election of members of the House of Assembly, but no such law shall disqualify any person (other than a Native, as defined in s. 1 of the Representation of Natives Act, 1936) in the Province of the Cape of Good Hope who, under the laws existing in the Colony of the Cape of Good Hope at the establishment of the Union, is or may become capable of being registered as a voter from being so registered in the Province of the Cape of Good Hope by reason of his race or colour only or disqualify any Native, as so defined, who under the said Act would be or might become capable of being registered in the Cape Native voters' roll instituted under that Act from being so registered, or alter the number of the members of the House of Assembly who in terms of the said Act may be elected by the persons registered in the said roll, unless the Bill embodying such disqualification or alteration be passed by both Houses of Parliament sitting together, and at the third reading be agreed to by not less than two-thirds of the total number of members of both Houses. A bill so passed at such joint sitting shall be taken to have been duly passed by both Houses of Parliament.

"(2) No person (other than a Native as so defined) who at the passing of any such law is registered as a voter in any province shall be removed from the register by reason only of any disqualification based on race or colour."

[8] s. 152 of the South Africa Act is as follows:

"152. Parliament may by law repeal or alter any of the provisions of this Act: Provided that no provision thereof, for the operation of which a definite period of time is prescribed, shall during such period be repealed or altered: And provided further than no repeal or alteration of the provisions contained in this section, or in ss. 33 and 34 (until the number of members of the House of Assembly has reached the limit therein prescribed, or until a period of ten years has elapsed after the establishment of the Union, whichever is the longer period), or in ss. 35 and 137, shall be valid unless the Bill embodying such repeal or alteration shall be passed by both Houses of Parliament sitting together, and at the third reading be agreed to by not less than two-thirds of the total number of members of both Houses. A Bill so passed at such joint sitting shall be taken to have been duly passed by both Houses of Parliament."

[9] The court took the view, which seems clear enough, that the object of s. 35 was to ensure that, unless the unicameral two-thirds majority procedure were used, registration on *any* voters' roll in the Cape Province was not to be conditioned by, or made dependent on, race or colour. The "Act," therefore, "disqualified" both Europeans and non-Europeans from remaining on a common roll on the ground of their race or colour See p. 455 of the judgment.

the two-thirds majority procedure, are rules of law which are still of full force and effect, notwithstanding the passing of the Statute of Westminster or any other event that has occurred since the formation of the Union, and that it is the court's duty to take cognisance of such law. Act 46 of 1951 should, therefore, have been dealt with by the two-thirds majority procedure. It was common cause, however, and also clear *ex facie* the measure,[10] that it had not been so dealt with; and it followed, in the court's view, that it should be declared invalid and void of legal effect.

That, in outline, is what the court decided. By what process of reasoning was the decision reached?

At the outset, their Lordships were faced with a choice between two fundamentally different methods of approach. They were asked by counsel for the Minister to treat the questions before the court as depending for their solution upon a true view of the British doctrine of Parliamentary Sovereignty. He argued that, subject to one exception, the Union Parliament had been created as an exact replica of the United Kingdom Parliament. The exception was that between the years 1910–31, there existed certain fetters upon the legislative power of the Union Parliament; among them, in his submission, the requirement of observing the procedure in the entrenched sections. But, with the passing of the Statute of Westminster, all fetters fell away, and thereupon, he argued, the Union Parliament took the place of the Parliament of the United Kingdom as the sovereign legislature in the Union. It followed—so the argument ran—that the relation between the Union Parliament and the courts came to be the same as the relation between the United Kingdom Parliament and the British courts. Having thus sought to introduce the concept of British Parliamentary sovereignty, counsel contended that it "supplied all the answers." No British court could question the validity of the Separate Representation of Voters Act, had it

[10] It was said by Centlivres C.J. at p. 469, that "had Act 46 of 1951 stated that it had been enacted by the King, the Senate and the House of Assembly in accordance with the requirements of ss. 35 and 152 of the South Africa Act, it may be that courts of law would have been precluded from inquiring whether that statement was correct." But, as observed by the Chief Justice at p. 469, "the original of the Act signed by the Governor-General and filed . . . bears the certificate of the President of the Senate and the Speaker of the House of Assembly, to the effect that it was passed by the Senate and the House of Assembly respectively. This shows clearly that the Act was not passed by the Senate and the House of Assembly sitting together." It may be added by way of explanation that at a joint session the Speaker of the Assembly presides (s. 58 of the South Africa Act); and that in all cases since Union where Bills have been passed in joint session, the original bears only the written assent of the Governor-General and the certificate of the Speaker.

In other words, to quote the language of an early English case, *The King and Hunsdon* v. *The Countess of Arundel* (80 E.R. 258), the measure "carried its death wound in itself." A number of important points are involved here; as will be seen when, in the second part of this article, we come to consider the law on the question of the extent to which a court will pursue its inquiry into the authenticity of a document purporting to be an Act of Parliament. It will be necessary to discuss the legal effect of the enacting clause, of the Governor-General's assent, and of the fact of enrolment.

been passed by the United Kingdom Parliament; therefore, he contended, no South African court should do so.

The court rejected this argument. It was not prepared to accept as self-evident the major premise upon which it is based, namely, that the Union Parliament has always been a replica of the United Kingdom Parliament in regard to its mode of legislating. On the contrary, it found the premise to be false. The Union Parliament, their Lordships held, is, and always has been, different in *kind* from the United Kingdom Parliament; and this, as we shall see presently, is the key to the understanding of the whole inquiry.

The court began its reasoning with the incontrovertible fact that the Union of South Africa and its Parliament were created by a specific document, namely, a Statute of the United Kingdom Parliament, known as the South Africa Act, 1909. It was, therefore, by reference to the exact terms of that document that the main problems in the case were, in the first instance, to be resolved. It would then be necessary to inquire whether any subsequent event, more particularly the Statute of Westminster, had brought about any relevant change. If an inquiry along these lines involved a finding that one could not properly attach the label " sovereign " to the Union Parliament, that would be a *result* (which may or may not be deplored) of determining the real issues in the case; the abstract question of sovereignty, however, was not itself involved.[11]

Approaching the matter from this point of view, the court recognised that the particular Parliament which had been created for the Union by the South Africa Act, differed, at the moment of its creation, from the United Kingdom Parliament in two relevant respects: (a) in regard to its powers, and (b) in regard to its mode of legislating. As regards legislative power, it was common cause that the Union Parliament began its career with certain limitations,[12] whereas, in the case of the United Kingdom Parliament, it had been clear since the seventeenth century that there were no laws which were beyond the power of Parliament to make or unmake.[13]

The second point of difference, however, is the one to note: it was keenly disputed in the argument before the court, and, in the result, proved to be decisive. The component elements of the Union Parliament are declared in the South Africa Act to be three in number, namely—as in the case of the United Kingdom Parliament—the Queen, an Upper House (the Senate) and a Lower House (the House of Assembly); but the manner in which these elements are required to combine for action in order to legislate, differs radically under the South Africa Act from the position in Britain.

[11] The question whether the Union Parliament may properly be described as a sovereign legislature will be discussed in the second part of this article.

[12] These limitations were (a) the overriding authority of the Imperial Parliament; (b) an incapacity to legislate in conflict with the terms of the Colonial Laws Validity Act, 1865; and, possibly, (c) an incapacity to legislate with extra-territorial effect.

[13] The point will be more fully discussed in the second part of this article.

Whereas in Britain all legislation on every topic may competently be made by the assent of the Queen and a majority vote of the Lords and the Commons, sitting separately,[14] in South Africa, the three elements of the Union Parliament are required to combine for action in different ways for different legislative purposes. Thus, the ordinary run of legislative business may competently be carried out in South Africa in the same way as in England, *i.e.*, bicamerally by the Houses sitting separately. In the case of a deadlock between the Houses, however, the procedure is by way of a joint session and a simple majority vote[15]; and finally, for the purposes of legislation coming within the ambit of the entrenched sections, the appropriate procedure is a joint session and a two-thirds majority vote.

In other words, the concept of parliament, as a law-making body in action,[16] is a different and more complex concept in South Africa, than in Britain. The court recognised that, having regard to the position of the Union Parliament at the time of its inception, the provisions of the entrenched sections were part of the definition of the Union Parliament,[17] and not a limitation upon the powers of an exclusively bicameral parliament, which could be assumed to function in the same way as the United Kingdom Parliament.[18]

The next stage in the inquiry was to ascertain whether any event had occurred since union to change the Union Parliament's method of enacting valid legislation. And, in this regard, there was one event, and only one, which was seriously relied on by counsel for the Minister: namely, the passing of the Statute of Westminster. He submitted that there were two reasons why

[14] The provisions of the Parliament Acts, which authorise legislation by the Queen and the Commons, will be considered later.

[15] The procedure upon a deadlock is set out in s. 63 of the South Africa Act.

[16] See *Parliamentary Sovereignty, etc.*, at pp. 5–8. The definition of Parliament, both in the United Kingdom and in South Africa, by reference (a) to the designation of the component elements in whom legislative power is vested, and (b) to the manner in which that power must be exercised, will be elaborated in the second part of this article.

[17] At pp. 463–5. See also pp. 289–90 below

[18] This point was stoutly disputed by counsel for the Minister of the Interior, who argued, inter alia, that a measure passed in joint session in terms of the South Africa Act, was prima facie not an Act of the Union Parliament; and could only rank as such by virtue of the provisions of the Act which state that such a measure "shall be taken to have been duly passed by both Houses of Parliament." See ss. 35, 63, and 152.

There are a number of answers to this. Thus: (i) note that the wording is not "shall be taken to have been passed by Parliament," but by both Houses of Parliament; (ii) in a case where a measure is duly passed in joint session notwithstanding the disapproval or *total absence* of all Senators—which is quite possible, when account is taken of the numbers of the membership of the respective Houses—the "deeming clause" would avert a contention that one of the constituent elements of Parliament, namely the Senate, had not functioned; (iii) the deeming clause may also have been inserted to avert a contention that it was necessary for legislation, duly passed in joint session, to be passed, *in addition*, bicamerally in the ordinary way; and (iv) the clause was peculiarly appropriate in the deadlock section (s. 63), and it made for tidy draftsmanship to include it in ss. 35 and 152 as well. In this regard, a perusal of the various drafts of the South Africa Act reveals that the deeming clause first appeared in the deadlock section and not in the other sections.

that statute had deprived the entrenched sections of their efficacy. First, he contended that the force of those sections had depended entirely upon the operation of the Colonial Laws Validity Act, 1865, and so fell away when in 1931, by virtue of section 2 (1) of the Statute of Westminster, that Act ceased to apply. Secondly, the Statute of Westminster, as a whole, and more particularly section 2 (2) thereof, had conferred new powers upon the Union Parliament and, in so doing, had changed the character of the entrenched sections.[19] Elaborating this latter submission, he argued that whereas before the Statute of Westminster the unicameral two-thirds majority procedure was obligatory for legislation falling within the ambit of those sections, it was now optional for the Union Parliament to legislate bicamerally or unicamerally, or in any way it pleased, no matter what the subject-matter of the legislation might be. In the result, to quote counsel's phrase, "the sting had been taken out of the entrenched sections." And, in support of these submissions, he relied, in the main,[20] on a series of decisions of the Privy Council on the interpretation of the Statute of Westminster, of which the chief was *Moore* v. *Attorney-General for the Irish Free State*[21]; the absence of saving sections in the Statute of Westminster in relation to the Union[22]; and the decision of the South African Appeal Court in the case of *Ndlwana* v. *Minister of the Interior*.[23]

It would be of interest to discuss in detail the court's findings on each of these points and to follow up their bearing in the law of the various Commonwealth countries. It is certainly tempting to dwell a little on those parts of the judgment which decide that the events leading up to the passing of the Statute of Westminster are

[19] s. 2 (2) of the Statute of Westminster is as follows:
"No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, *and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion.*" (The italics are the writer's.)

[20] Counsel for the Minister did not seek to support his case in any way by reference to the Status of the Union Act, 1934, s 2 whereof roundly declares that "The Parliament of the Union shall be the sovereign legislative power in and over the Union." The reason why the Status Act did not assist his argument appears clearly from the following passage in the judgment of Centlivres C.J. at p. 464; "During the course of the argument, Mr. Beyers correctly stated that the Status Act carried the matter no further. If the Statute of Westminster did not have the effect of repealing or modifying the entrenched clauses of the South Africa Act, then those provisions remained intact after the Statute was passed, and the Union Parliament could not by means of an Act, like the Status Act, passed bicamerally, repeal or modify those entrenched clauses." .

[21] [1935] A.C. 484.

[22] See, in relation to the Constitutions of Canada, Australia and New Zealand, ss. 7, 8 and 9 of the Statute.

[23] [1937] A.D 229

admissible in aid of its interpretation [24]; that the efficacy of the entrenched sections has never depended on the existence of the Colonial Laws Validity Act, and that, accordingly, the repeal of that Act by the Statute of Westminster was irrelevant [25]; that neither the absence of saving clauses in the Statute of Westminster in relation to the Union nor the decision in *Moore's Case* assisted the Government's argument; and that the Court of Appeal should not hesitate to declare an error in its previous decision in *Ndlwana's Case* if it was clear that an error had been made.[26] But these topics have been discussed by the writer elsewhere and further comment must wait another occasion. The essential object of examining the effect of events that have occurred since the formation of the Union, was to ascertain whether the Union Parliament's mode of legislating, as established by the South Africa Act, had been changed in any relevant and material respect. And it must suffice here to elucidate the court's findings on this point.

The essence of the matter is contained in the following passages of the judgment of Centlivres C.J., who delivered the unanimous decision of the court:

> " . . . It is the South Africa Act, and not the Statute of Westminster, which prescribes the manner in which the

[24] At p. 457. The historical material referred to by counsel on both sides, and by the court, included: the reports of (a) the Imperial Conference of 1926, (b) the Conference on the operation of Dominion Legislation, 1929, (c) the Imperial Conference of 1930, and (d) the resolution of the Union Senate and House of Assembly, authorising the enactment of the Statute of Westminster. See, generally, on this subject, Professor W. P. M. Kennedy's essay entitled " Interpreting the Statute of Westminster " in *Essays in Constitutional Law*; and the writer's *Parliamentary Sovereignty and the Entrenched Sections of the South Africa Act*, *supra*, at pp. 24–28. And see note 48 below.

[25] The court disposed of the argument based on the Colonial Laws Validity Act by holding that the provisions of that Act did not apply to " the repeal or alteration " *of the South Africa Act*, because such repeal or alteration was specifically dealt with, and authorised, by s. 152 of the South Africa Act—a *later* Act of the Imperial Parliament. (*Cf. Parliamentary Sovereignty, etc.*, *supra*, p. 17, note 44.)

It is submitted that, in any event, the question of repugnancy just could not arise. A unicameral amendment of the entrenched sections, in terms of its provisions, would be consistent with, not repugnant to, those provisions. On the other hand, bicameral " legislation " within the ambit of the entrenched sections would not be " repugnant legislation " in terms of the Colonial Laws Validity Act: it would simply be invalid in terms of the South Africa Act, there being no need to look beyond the South Africa Act itself to reach this conclusion. See *Parliamentary Sovereignty, etc.*, *supra*, at p. 19.

[26] The judgment in *Harris' Case* sheds valuable light on the subject of judicial precedent in South Africa. It has been said that in refusing to follow its previous decision in *Ndlwana's Case* [1937] A.D. 229, the court introduced intolerable uncertainty into the law, because a subsequent bench of judges may prefer *Ndlwana's Case*. The point is bad. As Centlivres C.J. observed in *Harris' Case*, he was not in the invidious position of preferring his own reasons to those of his predecessors; because in *Ndlwana's Case* categorical statements were made (a) without *any* reasons being given; and (b) without hearing argument for or against the main conclusion at which the court arrived; namely, its interpretation of the Statute of Westminster. See at pp. 468, 471. This could certainly not be said by any subsequent court about the carefully reasoned decision in *Harris' Case*, which was given after six days of thorough argument. See also note 98 below.

constituent elements of parliament must function for the purpose of passing legislation. . . .[27] The words 'Parliament of a Dominion' in the Statute of Westminster must, in my opinion, be read, in relation to the Union in the light of the South Africa Act . . . one is doing no violence to language when one regards the word 'parliament' as meaning parliament sitting either bicamerally or unicamerally in accordance with the requirements of the South Africa Act. . . .[28] Once it is clear that parliament means parliament functioning in accordance with the South Africa Act, the concluding words of the subsection carry the matter no further."[29]

In other words, in considering the effect of the Statute of Westminster on the status of the Union Parliament, the first and fundamental question was: "What is the Union Parliament?" And the answer to that question, their Lordships held, was to be found today, as in 1910 when the Union was formed, in the South Africa Act. The two-thirds majority procedure was part of the definition of the Union Parliament; and it was for this reason that a grant of power to "parliament" in the Statute of Westminster carried the matter in issue no further.[29a] Indeed, it was correct to say that before the passing of the Statute of Westminster the Parliament of the Union, functioning in terms of the South Africa Act, had complete power to amend the entrenched sections.[30]

The court clearly appreciated the fact that the Statute of Westminster had enlarged the powers of the Union Parliament, duly functioning in terms of the South Africa Act. Thus, it removed all restrictions then existing upon the power of that parliament to legislate repugnantly to British statutes.[31] Further, it removed any inability that might have existed on the part of the Union Parliament to legislate with extra-territorial effect.[32] And, finally, it terminated the legislative supremacy of the British Parliament in South Africa.[33] But one effect it did not have, and that was to change the definition and mode of legislating of the Union Parliament as set out in the South Africa Act.

Having reached the conclusion that the entrenched sections had been left intact by the Statute of Westminster, it followed, in their Lordships' opinion, that they had power to declare the Separate Representation of Voters Act invalid. This is an aspect of the subject which will be elaborated in the second part of this article. Here it is relevant and sufficient to note that in 1930 in the case of *Rex* v. *Ndobe*[34] the South African Court of Appeal had specifically

[27] At p. 464.
[28] At p. 468.
[29] At p. 465.
[29a] See the writer's *Parliamentary Sovereignty, etc.*, pp. 23–4.
[30] At pp. 462–3.
[31] At pp. 461–2.
[32] At p. 460.
[33] At p. 460. See below, pp. 292 and 294, note 47.
[34] [1930] A.D. 484

rejected a contention (based on the privilege of the Houses of Parliament to be the sole judges of the lawfulness of their own internal proceedings) that the courts had no jurisdiction to inquire into the observance of the entrenched sections. Thus, as de Villiers C.J. then said [35]:

> "This is a contention with which we cannot agree. Under section 58 of the South Africa Act, each House of Parliament is free to prescribe its own rules with respect to the order and conduct of its business and proceedings. Into the due observance of such rules this court is not competent to inquire. But whether an Act has been validly passed by Parliament is another matter."

In the subsequent case of *Ndlwana* v. *Minister of the Interior*,[36] however, Stratford A.C.J., held that, in consequence of the passing of the Statute of Westminster, "the procedure express or implied in the South Africa Act is so far as courts of law are concerned at the mercy of parliament like everything else." And he sought to put aside the judgment in *Ndobe's Case* in a single sentence:

> "It is not necessary," he said, "to refer to the case of *Rex* v. *Ndobe* since that case was decided before the Statute of Westminster."

But, as the Appeal Court has now so clearly shown in *Harris' Case*,[37] if the contention that the courts had no jurisdiction on the ground of Parliamentary privilege was unsound before the Statute of Westminster, it was equally unsound thereafter. The Statute of Westminster certainly did not purport to introduce new law into the Union on the subject of *lex et consuetudo Parliamenti*. Accordingly, once it was clear, upon a proper construction, that that statute did not either expressly or impliedly modify the internal machinery for law-making in South Africa,[38] it followed, in the words of Centlivres C.J., that "the principles enunciated in *Rex* v. *Ndobe* are still sound law, *viz.*, that courts of law have the power to declare Act 46 of 1951 invalid on the ground that it was not passed in conformity with the provisions of sections 35 and 152 of the South Africa Act."

We are now in a position to go on to the wider questions of sovereignty which are said to have been involved. And, at the

[35] At p. 457.
[36] [1937] A.D. 229, at pp. 236, 238.
[37] At pp. 469–70.
[38] At p. 469. One of the vital mistakes, the court held, that was made in *Ndlwana's Case*, *supra*, was that Stratford A.C.J. assumed, without argument on the point, that the Statute of Westminster had brought about a most material change in regard to South Africa's internal machinery for legislating. *Per* Centlivres C.J. at p. 471. It was erroneously assumed that the Statute of Westminster transformed the Union Parliament from a legislature which functions in the manner described earlier in this article into an exact replica of the United Kingdom Parliament. See *Parliamentary Sovereignty, etc.*, pp. 48 *et seq.*

outset, it seems necessary to call attention to an elementary distinction between the sovereignty (or independence, to use the better word in this context) of a State, and the sovereignty of its legislature; for these two different ideas have been naïvely confused in the South African controversy. Discussion of the sovereignty of South Africa *qua* State will occupy the space allotted to this part of the article. In the second part we shall discuss the sovereignty of the Union legislature and the notion of the "sovereign will of the people."

State Sovereignty

It is clear that when we say that a State is sovereign all we mean is that no other State may competently interfere in its affairs. The fact that a particular country does or does not possess a sovereign legislature is irrelevant to the question of State sovereignty. The textbook example is, of course, the United States of America—a sovereign State in which the search for a single organ of government with sovereign legislative power is generally regarded by lawyers as being both pointless and futile.[38a] In short, independence is the sole criterion of State sovereignty.[39] The Appeal Court went out of its way to remove misapprehension on this point and stressed the fact that South Africa is today a sovereign State. "The only legislature," their Lordships held,[40] "which is competent to pass laws binding in the Union is the Union Legislature. There is no other legislature in the world that can pass laws which are enforceable by courts of law in the Union. . . . The Union is an autonomous State in no way subordinate to any other country in the world." The interesting feature of this conclusion is that it involved a finding that the Statute of Westminster contained a legally irrevocable withdrawal or abandonment of legislative power in the Union on the part of the Imperial Parliament—at any rate in the eyes of the South African courts. And, it may be worth while—without quarrelling with that conclusion—to consider the point a little more closely later; but for the moment it suffices to note that counsel for the Minister fully accepted this position.[41]

On what possible ground, then, could it be contended that the continued efficacy of the entrenched sections impairs the sovereignty

[38a] This will be further discussed in the second part of the article.

[39] The books and cases sometimes distinguish State sovereignty from legislative sovereignty by designating the former "external sovereignty" and the latter "internal sovereignty." Thus, as Innes C.J. observed in *R. v. Christian* [1924] A.D. at p. 106: "Sovereignty is exercised in two directions, internally it relates to the power of making and enforcing laws, externally to freedom from outside control." Mr. J. D. B. Mitchell makes the point crisply in an article in the *Juridical Review*, 1951, pp. 70–71.

[40] At pp 467–8.

[41] "Freedom once conferred cannot be revoked" said Stratford A.C.J. in *Ndlwana's Case* [1937] A.D at p 237; and, as counsel for the Minister emphasised, he accepted every line, every word and every comma of that decision. Stratford A.C.J. seemed to regard his statement as non-contentious. But see note 47 below in regard to the position in English law.

of South Africa *qua* State? And, in any event, what had the subject of State sovereignty to do with the case? Let us take these questions in turn.

The reasons that have been put forward to support the contention that the efficacy of the entrenched sections impairs the sovereignty of South Africa *qua* State, are difficult to deal with crisply, mainly because they are intrinsically so nebulous and have been so vaguely formulated. Thus, it was argued on behalf of the Minister of the Interior that if the Union Parliament is not able to function in exactly the same way as the British Parliament for all purposes, then South Africa cannot be a sovereign State "unless it breaks completely with its past and abolishes the monarchy." The court rejected this argument on the ground that it seemed to be based on the fallacy that unless a State possessed a legislature of the same kind as the British Parliament it was not a sovereign State—a proposition which their Lordships felt might be just a trifle surprising in the United States of America; and, one might add, in the great majority of the sovereign independent States of the modern world. In fact, counsel's submission seems to have telescoped at least two contentions into one; and each should be disentangled.

The first point was the erroneous submission to which the court referred and which it disposed of. The second point lurks in the phrase "unless it breaks with its past. . . ." What seems to be implied here is that South Africa cannot be regarded as a sovereign State unless its system of law and government can be shown to have a South African root. It will be remembered that their Lordships took the view that the whole inquiry into the nature of the Union Parliament was to be resolved by considering the interpretation and legal effect of two statutes of the British Parliament: the South Africa Act and the Statute of Westminster. And, in the result, the court held that the law governing the Union Parliament's mode of legislating was to be found in the South Africa Act, the terms of which were still operative in the Union.[42] But why, it may be asked, is the South Africa Act still law in the Union? Does it rest on the authority of the British Parliament? Is it law because the British Parliament says so in the present imperative? If not, on what basis does its authority rest?

These are no doubt interesting questions, but it is essential to observe that they were irrelevant to the determination of the issue before the court in *Harris' Case*; for it was common cause between the parties to the litigation that the South Africa Act *is*, in fact, still good law in the Union today; the dispute being solely as to its interpretation. The question why it is law only arose incidentally during the argument, and very little attention was given to it either by counsel or by the court.

It is important to note, too, that the question why the South Africa Act is law in the Union today is not primarily a legal question.

[42] At p. 464.

As Kelsen,[43] and before him, Salmond[44] and particularly Bryce,[45] have so clearly perceived, the process of tracing back the authority of the rules of a legal system must ultimately reach a point beyond which the lawyer cannot go. There comes a point when the question why is this or that the law can receive only one answer. "It is the law," to quote Salmond, "because it is the law and for no other reason that it is possible for the law itself to take notice of."[46] In every legal system there are certain rules which are "ultimate," in the sense that beyond them lie only those forces of history, of ethics and of politics, upon which all law rests.

It may be accepted that the ultimate law-making authority in South Africa today—certainly in the eyes of the Union courts—is the Union Parliament, and that there is no other legislature in the world whose decrees will be recognised in the Union.[47] But the

[43] See, for example, *General Theory of Law and State*, Harvard.
[44] *Jurisprudence*, 10th ed. at p. 155.
[45] *Studies in History and Jurisprudence*, Vol. 2, pp. 52, 57. [46] *Op. cit.*, p. 155.
[47] There is little doubt that in the eyes of the South African courts the Statute of Westminster has resulted in a formal break in the continuity of the South African legal system; for whereas before 1931 the British Parliament was recognised (in theory at least) as having ultimate law-making authority in South Africa, that is no longer the position. See *Harris Case* at pp. 460, 467. It is most unlikely that a South African court would have enforced a British statute, purporting to extend to the Union, if it had been passed between 1931 and 1934, and it were clear that the request and consent of the Union Government had not been obtained in terms of s. 4 of the Statute of Westminster. And, since 1934, any doubt on the subject seems to have been removed by the Status of the Union Act, which enacts that no Act of the British Parliament passed after the coming into force of the Statute of Westminster "shall extend or be deemed to extend, to the Union, as part of the law of the Union, unless extended thereto by an Act of the Parliament of the Union." See *per* Centlivres C.J., at p. 467.

The explanation of the break in terms of *English law* presents some difficulty. In *British Coal Corporation* v. *R.* [1935] A.C. 500, at p. 520, Lord Sankey said, *obiter*, that: "the Imperial Parliament could, as a matter of abstract law, repeal or disregard s. 4 of the Statute of Westminster. But that is theory and has no relation to realities."

This dictum would doubtless have fairly wide support in England; but, with respect, the question is not quite so simple as Lord Sankey would have us suppose. In fact, it has been seriously suggested that there are grounds upon which even an English court should refuse to enforce a measure, purporting to extend to a Dominion, but which, on the face of it, showed that the request and consent of the Dominion had not been obtained. Thus: (1) Sir Owen Dixon (*Law Quarterly Review*, 1935, Vol. 51, pp. 604, 611) and Sir Ivor Jennings (*Law and Custom of the Constitution*, 3rd ed., pp. 145 *et seq.*) have shown how a logical argument could be developed in support of the contention that the Imperial Parliament has validly and effectively re-defined itself, in s. 4, by introducing a new manner of law-making for the Dominions; and (2) Dr. H. V. Evatt, invoking the support of Sir William Anson, inclines to the view that "the courts of the United Kingdom . . . should regard the absence from any Statute of the Parliament at Westminster of the declaration of request and consent by the Dominion to whom it is sought to be applied as effectively preventing such application." See Evatt, *The King and His Dominion Governors*, 1936, at p. 308–9: Anson, *Law Quarterly Review*, 1886, Vol. 2, p. 440. A sovereign Parliament notes Evatt, quoting Anson, may surrender its sovereign powers over a certain area to another person or body. And he adds: "Why should not 'abdication' or 'surrender' be possible upon a functional, as well as a geographical footing?": *op. cit.*, p. 309, note 8.

These questions, however, need not detain us now. They will be discussed in the second part of this article.

fact remains that the definition and essential character of the Union Parliament are set out in specific terms in the South Africa Act, the relevant provisions of which were left intact by the Statute of Westminster.[48] And, if the further question be asked, why should one look to the South Africa Act to ascertain what is the Union Parliament, and the relationship between it and the courts, then doubtless, the historians of the constitution will point to the fact that since the passing of the Statute of Westminster, the provisions of the South Africa Act and the framework of government which it establishes, have been uniformly observed and accepted in the Union. People have regulated their lives under the South Africa Act; they have elected parliaments in accordance with its provisions; those parliaments have been constituted and have functioned in terms of it. And, finally, the courts in their day-to-day work, have acted, and continue to act, on the assumption that the South Africa Act is South African law. In short, the South Africa Act continues in force in the Union by the habit of observance.[49] Whether it will continue in force in the future, on the same basis, is beyond the scope of this article, and, in any event, depends on factors which lie outside the lawyer's field. As Lord Bryce has pertinently observed:—

> "The question, Who is Legal Sovereign? stands quite apart from the questions, Why is he Sovereign? and Who made him

[48] It would be surprising if they had not been left intact; for, as the court pointed out, at p. 464, the alternative interpretation would mean that the Imperial Parliament went out of its way to change the Constitution of South Africa in the teeth of the authoritative voice of the country as recorded in the following resolution, passed by the Senate and the House of Assembly, pursuant to which the Statute of Westminster was enacted: "That on the understanding that the proposed legislation will in no way derogate from the entrenched provisions of the South Africa Act, this House, having taken cognisance of the draft clauses and recitals which it was proposed by the Imperial Conference of 1930 should be embodied in legislation to be introduced in the Parliament at Westminster, approves thereof and authorises the Government to take such steps as may be necessary with a view to the enactment by the Parliament of the United Kingdom of legislation on the lines set out in the Schedule annexed." It was relevant, too, in resolving any doubt that arose in interpreting the Statute of Westminster, to note the fact that the South Africa Act, as its preamble states, embodied the terms upon which the pre-Union colonies agreed to unite for purposes of government. It was not lightly to be assumed that the Statute of Westminster was intended to upset the compact of Union by changing the internal arrangement of government.

[49] The writer has never sought to rely on the sort of contention unsuccessfully put forward by Sir Stafford Cripps in *Moore's Case*, *viz.*, that *before* the Statute of Westminster, the South Africa Act could not properly be regarded as a British Act resting on the authority of the British Parliament; and that, accordingly the Colonial Laws Validity Act and the Statute of Westminster could not be said to apply to it. See *Parliamentary Sovereignty, etc.*, p. 48. He accepted fully that, at the time of the passing of the Statute of Westminster, the South Africa Act rested on the authority of the British Parliament, and that the aforesaid Acts applied to it. But what really mattered, in the writer's view, was that there was nothing in the Colonial Laws Validity Act or in the Statute of Westminster which, upon a proper construction, in any way affected the efficacy of the entrenched sections.

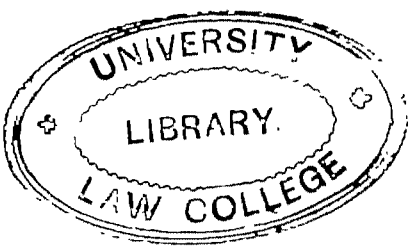
> Sovereign? The historical facts which have vested power in any given Sovereign, as well as the moral grounds on which he is entitled to obedience, lie outside the questions with which law is concerned, and belong to history, or to political philosophy, or to ethics; and nothing but confusion is caused by introducing them into the purely legal questions of the determination of the Sovereign and the definition of his powers." [50]

The other question which we have posed about State sovereignty —what had it to do with the case?—can be shortly dealt with. The inquiry before the court concerned the nature of, and the relations between, the internal organs of government in South Africa. State sovereignty was not in issue; and even if it had been, there can be no doubt that in the one field where the topic is important, namely, the field of International Law, South Africa—along with the other self-governing countries of the Commonwealth—has long been recognised as a full and independent member of the family of nations.

The whole subject of State sovereignty was, therefore, beside the point. Before leaving it, however, there is one small matter that may be mentioned. It is clear that the historical origin of the South Africa Act, the fact that in 1909 it was enacted in Great Britain, is irrelevant.[51] If South Africa could be said to be a non-sovereign State, dependent on Great Britain, merely because the origin of the South Africa Act is British, then with equal force—or rather lack of it—it may be said that South Africa is subservient both to Rome and to Holland because the greater part of the law in force in the Union has its origin there.[52]

D. V. COWEN.*

(To be continued.)



[50] *Op. cit.*, p. 57.
[51] *Harris' Case*, at p. 464.
[52] The fact that British statutes, *e.g.*, the Statute of Frauds, continued to run in the United States after the Revolution, as part of American law, has never seriously been regarded as derogatory of the sovereign independence of the United States.

* Professor of Comparative Law in the University of Cape Town.

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A STUDY IN THE RELATIONSHIP BETWEEN COMMON LAW AND EQUITY IN CONTRACTUAL MISTAKE

THE starting point for this study is the recent case of *Solle* v. *Butcher*.[1] There, the broad facts were that after making structural alterations in a certain flat the defendant let it to the plaintiff for seven years at a rent of £250 p.a. without having given notice of improvements under the Increase of Rent and Mortgage Interest (Restrictions) Acts, 1920, ss. 2 and 8 and 1938, s. 7 (4) which would legally have entitled him to charge the £250 p.a. instead of the previously established standard rent of £140 p.a. The lease having been executed, however, notice under the Acts became precluded.[2] The reason for the omission to give notice was that, following upon some consultation between the parties, it was decided that the structural alterations had so altered the identity of the "dwelling-house" as to make it a "new" dwelling-house and to release the new dwelling-house from the old standard rent. After a little over a year had elapsed, the lessee brought action against the lessor. He alleged that no change of identity had in fact occurred and that the lawful rent of the house was still the standard rent of £140, and claimed recovery of the amount overpaid. By way of counterclaim, the lessor alleged (inter alia) that the lease was entered into in circumstances of common mistake and further was voidable on the ground of innocent misrepresentation and, consequently, he was entitled to eject the lessee. The Court of Appeal held that in fact there had been no change of identity and that therefore the standard rent remained at £140 p.a.; but that the lease, being voidable in equity on the ground of common mistake (though not innocent misrepresentation), would be set aside on terms securing possession to the tenant and the rent of £250 p.a. to the landlord to run, in effect, from the very beginning of the tenant's occupancy.[3] Jenkins L.J. dissented on the ground that the lease contract remained unrescindable because the mistake was one of law.

The bilateral mistake of the parties in the case was variously described by the various learned judges as a mistake relating to (i) the effect of the structural alterations on the identity or nature of the property as being a new or old dwelling-house,[4] or (ii) the

[1] [1950] 1 K.B. 671. *Solle*, today, would be otherwise decided though on a different ground in accordance with the House of Lords' decision in *Langford* [1951] A C. 228.

[2] *Solle* v. *Butcher*, *supra*, 690. See also Megarry, *The Rent Acts*, 6th ed., 262–8.

[3] In regard to the period before rescission, the £250 was made subject to an appropriate reduction on account of the landlord's failure to do certain repairs.

[4] Bucknill L.J in the instant case, at 686.

(private) right of the lessor to raise the rent without any need to give notice of improvements,[5] or (iii) the effect of the "change of identity rule" and the Rent Restriction Acts on the rent chargeable for the dwelling-house in its altered condition.[6] Before focusing fully on those matters that form the main theme of this study, some remarks need to be made regarding the narrower and more immediate implications of the case. These revolve about the varying views of the kind of mistake that was present in *Solle*, which, in their turn, involve the issue of the distinction between law and fact in the present context, the definition of "private right" in the sense of the rule in *Cooper* v. *Phibbs*[7] and the type of "fundamental fact" illustrated in the instant case.

By section 12 of the 1920 Act the standard rent chargeable for a house falling within the scope of the Rent Restriction Acts is "the rent at which the dwelling-house was let on the 3rd August, 1918, or . . . in the case of a dwelling-house which was first let after the said 3rd August, the rent at which it was first let." By a judicial innovation originating in *Phillips* v. *Barnett*,[8] the Acts have been glossed to the extent that if, as a result of structural alterations, a dwelling-house undergoes a substantial change of identity, the house, as altered, will be regarded as a new "dwelling-house," and the landlord will, in its first post-transformation letting, be free to charge the full supply-and-demand rent which becomes thereupon the standard rent. It has further been held in an unbroken line of rent restriction cases that the question whether a substantial change of identity for the purposes of the Act has been effected or not is a question of fact.[9]

In *Solle* v. *Butcher*, the parties, if one adopt the majority view of the evidence,[10] understood the relevant provisions of the Rent Restriction Acts, understood the change of identity rule, but were mistaken as to the effect of the structural alterations upon the identity of the house. From this primary mistake flowed the secondary mistake that the lessor had by the alterations without more acquired a legal right to ask what rent he pleased in the lease in question.[11] Whilst the law-fact distinction is one incapable of precise delineation in a sentence, a sufficient approximation for the

[5] Denning L.J. *ibid.*, 692, 694–5. Also—*semble*—Bucknill L.J. at 686.
[6] Jenkins, L.J., *ibid.*, 698, 704, 705, 706.
[7] (1867) L.R. 2 H.L. 149.
[8] [1922] 1 K.B. 222. See Megarry, *op. cit.*, 81 *et seq.*
[9] *Phillips* v. *Barnett*, *ibid.*, at 227–8; *Sinclair* v. *Powell* [1922] 1 K.B. 393, 400; *Marchbank* v. *Campbell* [1923] 1 K.B. 245, 250; *Woodhead* v. *Putnam* [1923] 1 K.B. 252, 255; *Sutton* v. *Bayley* [1923] 2 K.B. 694, 700; *Williams* v. *Perry* [1924] 1 K.B. 936, 940; *Barrell* v. *Fordree* [1932] A.C. 676, 681–2; *Eyre* v. *Haynes* (1945) 62 T.L.R. 68; *Ellis* v. *Sisman* [1948] 1 K.B. 658, 665; *Hemns* v. *Wheeler* [1948] 2 K.B. 61, 65–6; *Mitchell* v. *Barnes* [1950] 1 K.B. 448, 451; and *Solle* v. *Butcher*.
[10] For the contrary view taken by Jenkins L.J. see *Solle*, *supra*, 704.
[11] Owing to his view of the facts and consequent mode of expressing the relevant mistake in the case, Jenkins L.J. adopted what I have called the secondary mistake as the primary. See passages cited in n. 7, *supra*.

present purpose to the total effect of the cases is afforded by Williston's suggested definition of a mistake of law as "either ignorance of a rule or principle of law or an erroneous conclusion as to the operation of the law upon a known set of facts." [12] The mistake regarding the identity of the house was one of fact on the authority of the rent restriction cases; also, it is submitted that it was one of fact in the light of Williston's definition since, while the parties were clear about the existence and applied meaning of the relevant law, they misunderstood the nature of the facts to which the law applied. Similarly, it is possible to argue that the misapprehension [13] regarding the lessor's right to take an unfettered rent was not one of law since it arose not from ignorance of the law or of its correct interpretation but from false conclusions of fact.[14] At most, it would seem to have been a mistake compounded of both law and fact and so, for legal purposes, equivalent to one of fact.

In part, Bucknill L.J.'s finding that the circumstances had produced a factual mistake was uncomplicated. The learned Lord Justice concluded: "In my opinion, therefore, there was a common mistake of fact on a matter of fundamental importance, namely, as to the identity of the flat with the dwelling-house previously let at a standard rent of £140 a year and that [*sic*] the principle laid down in *Cooper* v. *Phibbs* applies." [15] The last sentence does, however, introduce a complication. What Bucknill L.J. conceived as the principle in *Cooper* v. *Phibbs* is clear from a preceding passage: ". . . was this mistake a question of fact or a question of law? In my opinion it was a question of fact, and the principle applies to this case which was laid down by Lord Westbury in his speech in *Cooper* v. *Phibbs* where he said, 'If parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is, that that agreement is liable to be set aside as having proceeded upon a common mistake.'" [16] From these passages it is, I respectfully submit, a legitimate conclusion that Bucknill L.J. founded his judgment as well on the mistake relating to the lessor's (private) right to charge an unfettered rent as on that relating to the identity of the dwelling-house, but whether the grounds were alternative or cumulative is impossible to assess owing to the disjointed structure of the judgment in this respect.

Denning L.J., on the other hand, treated the mistake in the case as referring solely to the lessor's right in question with *Cooper* v. *Phibbs* as the authority, and on this main ground rested his decision.[17] In this respect then, the effect of the majority judgment,

[12] *Contracts*, § 1581.
[13] Here used as synonymous with "mistake"; *pace* Denning L.J. in *Solle*, *supra*, at 695, whose distinction appears to me, with great respect, to be over-refined for the needs of the law of contractual mistake.
[14] *Cf.* also *National Pari-Mutuel Association, Ltd.* v. *The King* (1930) 47 T.L.R. 111 (*per* Scrutton L.J.).
[15] *Supra*, at 686.
[16] *Ibid.*, at 685.
[17] *Ibid.*, at 692, 694–5

if followed, is that the meaning of Lord Westbury's statement of law in *Cooper* v. *Phibbs* has been made somewhat more specific, although, as in American law,[18] a wide fringe of uncertainty remains.

Cooper v. *Phibbs* is an important case for a number of reasons.[19] First, it is authority for the exception to the general rule that a mistake arising out of the misinterpretation of a document or of general law is one of law, the exception being constituted where the mistake arising from the misinterpretation refers to the parties' "relative and respective rights" or, at least, to the private rights of ownership.[20] In other words, *Cooper* represents the culmination of the development of equitable doctrine from *Lansdowne* v. *Lansdowne* [21] through *Bingham* v. *Bingham*,[22] *Broughton* v. *Hutt*,[23] and *Cochrane* v. *Willis* [24] to the proposition that a private right, or, at least, a private right of ownership, is a matter of fact, a doctrine taken over by common law.[25] Secondly, it affords an illustrative application of the broad equitable principle which is—apart from important remedial differences—the same as at common law, that where there is a bilateral mistake regarding a fact that is "fundamental" or "essential" to the contract, equity will set the contract aside, the important remedial difference consisting in the power in equity to attach terms to the rescission where justice so requires.[26] Thirdly, it contains Lord Westbury's much-cited, legal statement of undefined generality: "It is said, '*ignorantia juris haud excusat*' . . . But where the word '*jus*' is used in the sense of denoting a private right, the maxim has no application. Private right of ownership is a matter of fact; it may be the result also of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is, that that agreement is liable to be set aside as having proceeded upon a common mistake." [27]

[18] Williston, *Contracts*, § 1599.

[19] See also n. 48 (vi), *infra*, *Re Angel* v. *Jay*.

[20] *E.g.*, Pollock, *Contracts*, 13th ed., 575–6; Chitty, *Contracts*, 20th ed., 285, 460; Halsbury, *Laws of England*, 2nd ed., XXIII, 17, 131, Leake, *Contracts*, 8th ed., 237.

[21] (1730) Mos. 364.

[22] (1748) 1 Ves.Sen. 126.

[23] (1858) 3 De G. & J. 501.

[24] (1865) 1 Ch.App. 62.

[25] *Cf. Bell* v. *Lever Bros.* [1932] A.C. 218 (Lord Atkin) and *Norwich Union Fire Insurance Soc.* v. *Price* [1934] A.C. 462–8 (Privy Council). And no distinction between common law and equity is taken in this respect by the leading text-books.

[26] Expressed in *Cochrane* v. *Willis*, *supra*, 62, 68; *Beauchamp* v. *Winn* (1873) L.R. 6 H.L. 223; *Bettyes* v. *Maynard* (1892) 46 L.T. 769; *Huddersfield Banking Co.* v. *Lister* [1895] 2 Ch. 277, 281–2, 283, 285; *Scott* v. *Coulson* [1903] 2 Ch. 252, 258; *Munro* v. *Meyer* [1930] 2 K.B. 334; *Norwich Union Fire Insurance Society* v. *Price*, *supra*, 462–8; *Solle* v. *Butcher*, *supra*, 699. Illustrated, *e.g.*, in *Bingham* v. *Bingham*, *supra*, *Cooper* v. *Phibbs*, *supra*; *Daniell* v *Sinclair* (1881) 50 L.J.(P.C.) 50; *Bettyes* v *Maynard*, *supra*; *Huddersfield Banking Co.* v. *Lister*, *supra*; *Hickman* v. *Berens* [1895] 2 Ch. 638; *Scott* v. *Coulson*, *supra*; *Solle* v. *Butcher*, *supra*.

[27] *Supra*, 170.

Solle v. *Butcher* is relevant to the meaning and scope of Lord Westbury's statement in two respects. To begin with, although Lord Cranworth observed that there was a misrepresentation in *Cooper* v. *Phibbs* [28] nothing in Lord Westbury's judgment suggests that the learned and noble Lord's "private right principle" was intended to cover misrepresentation as well as mistake cases. In *West London Commercial Bank* v. *Kitson* [29] and *Mackenzie* v. *Royal Bank of Canada*,[30] it is true, misrepresentations of a private right were held to be misrepresentations of "fact," but in neither case was *Cooper* cited. In the former, the *ratio* was plain and had nothing to do with the Westbury principle,[31] whilst, in the latter, in the absence of reasoning and citation, the Privy Council may have had in mind Jessel M.R.'s classical definition of misrepresentation of law in *Eaglesfield* v. *Londonderry* [32] or the *ratio* in *Kitson's Case* and not the Westbury principle when it said: "It does not seem to admit of doubt that such a representation made as to the plaintiff's private rights and depending upon transactions in bankruptcy, of the full nature of which she had not been informed, was a representation of fact." [33] In *Solle*, however, Denning L.J. appears, from the context, not to have differentiated between mistake and misrepresentation when he remarked: " . . . the plaintiff . . . was making an ambiguous statement as to private rights; and a misrepresentation as to private rights is equivalent to a misrepresentation of fact for this purpose: *Mackenzie* v. *Royal Bank of Canada*."[34]

Secondly, *Solle* is here important in that it affirms the finding clearly inferable, so far as previous mistake cases are concerned, only [35] in the Privy Council decision of *Daniell* v. *Sinclair*,[36] to the effect that the conception of "private right" in the Westbury principle extends beyond the private right of ownership or title.[37]

[28] *Ibid.*, 164.
[29] (1884) 13 Q.B.D. 360.
[30] [1934] A.C. 468.
[31] *Supra*, 362, 363.
[32] (1875) 4 Ch.D., 702–8.
[33] *Supra*, 476.
[34] *Supra*, 695, read together with the preceding paragraph at 694–5.
[35] *Cf. Lansdowne* v. *Lansdowne*, *supra*; *Bingham* v. *Bingham*, *supra*; *Hitchcock* v. *Giddings* (1817) Dan. 1, *Broughton* v. *Hutt*, *supra*, *Cochrane* v. *Willis*, *supra*; *Cooper* v. *Phibbs*, *supra*; *Jones* v. *Clifford* (1876) 3 Ch.D. 779; *Hart* v. *Swaine* (1877) 7 Ch.D. 42; *Allcard* v. *Walker* [1896] 2 Ch. 369. But see counsel's argument in *Munro* v. *Meyer*, *supra*, 817.

Whether *Re Roberts* [1905] 1 Ch. 707, was decided on the footing of the Westbury principle is not clear from the report. With quasi-contractual cases, the position has been for long well-established; see *Anglo-Scottish Beet Sugar Corporation* v. *Spalding U.D.C.* [1937] 3 All E.R. 335, and cases cited there at 339–40.
[36] (1881) 50 L.J.P.C. 50.
[37] The *obiter dictum* of Wright J. in *Munro* v. *Meyer*, *supra*, 334, to the effect that the Westbury principle is confined to private rights of ownership must now be regarded as overridden. Similarly, one should disregard the fact that the Westbury principle was *not* evoked in *Bell* v. *Lever Bros.*, *supra*, or *British Homophone Co.* v. *Kuns* (1935) 152 L.T. 599. (Though it might have altered the decision in the latter, in the former it is difficult to see how, on

The limits of the extension, however, remain uncertain and to be determined in future litigation. For the time being, *Solle* continues that process which was begun in *Daniell's Case*, and (assuming the Westbury principle to apply to cases of misrepresentation) in at least *Mackenzie's Case*, and which is not uncommon in English law, of defining a highly general principle not in so many words but by the accumulation of specific instances. It may be added that, jurisprudentially, the widening of the circle of meaning of the Westbury principle is a sympathetic process since its larger consequence is to diminish the importance of distinguishing between "law" and "fact" in civil cases.

Granted, then, that the mistake in *Solle* referred to a "fact" or "facts," on what ground were they "fundamental"? As Denning L.J. put it: "A contract is . . . liable in equity to be set aside if the parties were under a common misapprehension either as to facts or [38] as to their relative and respective rights, provided that the misapprehension was fundamental." [39] As mentioned above,[40] the rule of equity is here identical, apart from the scope and flexibility of remedy, with that at common law, and, although no court has expressly stated it, I think it is by way of legitimate analogy to assert that in this equitable rule, "fundamental fact" has the same meaning as in the common law rule,[41] which has five specific categories of "fundamental fact" together with a residuary category.[42]

the reasoning of the majority, its invocation could have changed the decision.) As authority *sub silentio* (if at all), they are too weak to stand against the express judgment at least of *Solle* v. *Butcher*. The limits set so far in this respect to the Westbury principle are contained in (i) the general statement of Lord Atkin in *Bell* v. *Lever Bros.*, *supra*, at 218, that "Applied to mistake as to rights generally it would appear to be too wide"; (ii) the rule in *Wilde* v. *Gibson* (1848) H.L.C. 605, 632, 633 (*cf. Allen* v. *Richardson* (1879) 13 Ch.D. 542–3) and (iii) s. 12 Sale of Goods Act, 1893.

[38] Strictly, the disjunctive proposition is here misleading. "Facts" in the context above *include* the parties' "relative and respective rights."

[39] *Supra*, at 698.

[40] *Supra*, n. 26.

[41] One might say that here, "Equity follows the Law," provided one bears in mind Hohfeld's caution that the maxim is a "mere 'guidepost' and must not be taken literally": *Fundamental Legal Conceptions*, 128.

[42] For the specific heads see, *e.g.*, (1950) 13 M.L.R. 68, or Benjamin, *Sale*, 7th ed., 105. The residuary category may be described, in the words of Lord Wright in *Norwich Union Fire Insurance Society*, *supra*, 468, as being, in an objective sense, "the underlying assumption of the contract or transaction," or, in the words of Greene L.J. in *Craven-Ellis* v. *Canons, Ltd.* [1936] 2 K.B. 413, as being, in an objective sense, "a fact" essential to the making of the agreement and [forming] the basis upon which the parties purported to contract." I have modified the view I expressed in 13 M.L.R., *supra*, in deference partly to the fact that that view appears unsupported by judicial utterance, which adheres rather to the wider view of Lord Wright and Greene L.J. and partly to the case of *Craven-Ellis* itself where, as a secondary ground of decision the contract there in issue was held void for a bilateral mistake referring to an attribute of a party which was vital because its existence "formed the basis upon which the parties purported to contract" and not—*semble*—because it affected identity: *supra*, 418, see also (1939) 55 L.Q.R. 55. As in the case of other residuary categories, like that in charitable trusts, the danger inhering in this residuary head of "fundamental fact" is that it

That the misunderstanding of the effect of the structural alterations was not a mistake as to the identity proper of the subject-matter is, I think, plain. Thus, Denning L.J.: "The parties agreed in the same terms on the same subject-matter." [43] And Jenkins L.J.: "The defendant meant to grant and the plaintiff meant to take a lease in the terms in which the lease was actually granted of the premises which the lease as granted actually comprised." [44] The mistake regarding the change of identity can be classified as one referring to a vital quality or attribute of the subject-matter (within the rule in *Bell* v. *Lever Bros.*[45]), in that a dwelling-house freed from its old standard rent is, for practical purposes, substantially different from one still tied. It is in this sense, I would submit, that Bucknill L.J.'s first ground of decision should be read. The mistake looked at as referring to the lessor's private right might be classified in the same way, or, alternatively, in the residuary category of "fundamental fact" as being, from an objective viewpoint, a "private right affecting the basis of the contract entered into," [46] or "the underlying assumption of the contract or transaction." [47]

So much for the preliminaries regarding *Solle*, its immediate effect in law and its place in the long list of mistake cases. I now want to turn to what I consider to be its wider implications; for the judgment of Denning L.J. contains, in my opinion, by far the most important and comprehensive attempt to reinterpret the law of contractual mistake since Lord Atkin's judgment in *Bell* v. *Lever Bros.* The nuclear passage runs: "All previous decisions on this subject must now be read in the light of *Bell* v. *Lever Bros., Ltd.* [1932] A.C., at pp. 222, 224, 225–27 and 236. The correct interpretation of that case, to my mind, is that, once a contract has been made, that is to say, once the parties, whatever their inmost states of mind, have to all outward appearances agreed with sufficient certainty in the same terms on the same subject-matter, then the contract is good unless and until it is set aside for failure of some condition on which the existence of the contract depends, or for fraud, or on some equitable ground. Neither party can rely upon his own mistake, to say it was a nullity from the beginning, no

might become over-extended. An objective interpretation of the head mitigates the danger, which would be entirely obviated if the courts always disposed of an equitable discretion; and this would be so were common law displaced in contractual mistake by equity, as is later urged in the text above.

[43] *Supra*, at 692.

[44] *Ibid.*, 705.

[45] The actual finding of fact in *Bell* v. *Lever Bros.* and *Leaf* v. *International Galleries* [1950] 2 K.B. 86 tends to militate against this, without, of course, being decisive. But *cf. Nicholson & Venn* v. *Smith-Marriott* (1947) 177 L.T. 189. On the other hand, as the "fact" in *Solle* was held to be "fundamental" in the equity sense, it was also so in the common law sense, as there is, in my submission, no distinction between the meanings of the conception in the two systems.

[46] Jenkins L.J., *Solle*, *supra*, 705.

[47] Lord Wright, nn. 26, 42, *supra*.

matter that it was a mistake which to his mind was fundamental, and no matter that the other party knew that he was under a mistake. *A fortiori*, if the other party did not know of the mistake, but shared it. The cases where goods have perished at the time of sale, or belong to the buyer, are really contracts which are not void for mistake but are void by reason of an implied condition precedent, because the contract proceeded on the basic assumption that it was possible of performance." [48]

[48] *Supra*, at 691. This is a convenient juncture at which to footnote some comments on six asides of Denning L.J. regarding mistake and misrepresentation:

(i) In respect of what courts of equity considered to be unconscientious, Denning L.J. said "equity has shown a progressive development. It is now clear that a contract will be set aside if one party, knowing that the other is mistaken about the terms of an offer or the identity of the person by whom it is made, lets him remain under his delusions and concludes a contract on the mistaken terms instead of pointing out the mistake" (692). No authority was cited for this proposition, perhaps because none exists. The precise attitude of equity today is described in Story's *Equity Jurisprudence*, 3rd Eng. ed., 65–6. That Denning L.J.'s proposition would form a desirable rule of law is not to be questioned, at least in so far as it would enhance one of the most important features of commercial law, which is the improvement of commercial morality and the increase of good faith in commercial dealings, and would reverse the decision in *Smith* v. *Hughes*, as the learned Lord Justice later pointed out (693). For existing law to reach the position described, however, I think equity would have to make greater progress in its development than hitherto.

(ii) On the basis of the same proposition, "according to the view by Blackburn J., of the facts, the contract in *Lindsay* v *Cundy* was voidable and not void" (693), a method of disposing of a House of Lords decision by a judge of a lower court which must be one of the most breathtaking on modern record.

(iii) On the basis of the same proposition, again, "the lease in *Sowler* v. *Potter* was . . . voidable and not void" (693). The conclusion one would agree with, though, as already indicated, the reasoning is extremely debatable.

Earlier, Denning L.J. mentioned the sounder reason when he remarked: "I do not think that *Sowler* v. *Potter* can stand with *King's Norton Metal Co., Ltd.* v. *Edridge*, which shows that the doctrine of French law as enunciated by Pothier is no part of English law" (691–2).

(iv) "Nor do I think that the contract in *Nicholson & Venn* v. *Smith-Marriott* was void from the beginning" (692) The sole comment possible here is that the learned judge advanced no reason whatever for the statement cited.

(v) "*Bell* v. *Lever Bros*, *Ltd.*, . . . was treated in the House of Lords as a case at law depending on whether the contract was a nullity or not. If it had been considered on equitable grounds, the result might have been different" (694). *Bell* v. *Lever Bros.* involved a bilateral mistake; in equity, a contract will be set aside for such mistake provided the mistake refers to a "fundamental fact." In *Bell*, by majority judgment, the "fact" was not "fundamental" whether regarded as attribute of subject-matter or as "private right." Consequently, on the law as it is, the result in equity would have been the same as at common law. See also nn. 26 and 45, *supra*.

(vi) "No distinction can be taken between rescission for innocent misrepresentation and rescission for common misapprehension . . . *Cooper* v. *Phibbs* shows that rescission is available even after an agreement of tenancy has been executed and partly performed . . . If and in so far as *Angel* v. *Jay* decided that an executed lease could not be rescinded for an innocent misrepresentation, it was in my opinion a wrong decision" (695-6). The discrepancy between the rule in *Cooper* and the decision in *Seddon's Case* is a valid one to draw. But, the rule in *Cooper* pre-requires a "fact" that is "fundamental." Consequently, the decision in *Angel* v. *Jay*, where the "fact" involved appears to have been of "collateral" importance, cannot be influenced by juxtaposing *Cooper*. Denning L.J.'s choice of wording in *Solle* does not clash with this conclusion.

One is confronted with two problems: how far, in the first place, Denning L.J.'s restatement of the law of mistake is an organic development from the passages cited in *Bell* v. *Lever Bros.*, and, in the second place, the validity of the learned Lord Justice's restatement itself.

Briefly, *Bell* v. *Lever Bros.* was concerned with a problem of "fundamental fact" and the elucidation of the meaning of a vital quality of the subject-matter was the main contribution of Lord Atkin to mistake jurisprudence. Lord Atkin did, *obiter*, gather up and attempt to reinterpret the rules of contractual mistake, but the attempt, though of great value, remained incomplete in the judgment and did not, in my respectful submission, have the deep-reaching implications for the law of mistake which Denning L.J. claimed. Looking shortly at the passages on which the learned Lord Justice relied, p. 222 gives Lord Atkin's construction of decisions like *Smith* v. *Hughes*.[49] That construction I have already commented upon and criticised recently and to those comments and criticism I have here nothing to add.[50] P. 224 consists of no more than an emphatic underlining of the irrelevancies of uncommunicated beliefs in the law of contract: or, put another way, p. 224 reiterates one of the cardinal policies of the law of contract in giving special legal force to objective appearances. Lord Atkin's judgment at pp. 225–7 may be condensed into two propositions. First, conditions are not to be lightly implied into contracts, especially as an "alternative mode of expressing the result of a mutual mistake" (at 224) and, second, the type of fact to which a contractual term must refer before it can be a condition is one where "the new set of facts makes a contract something different in kind from the contract in the original set of facts" (at 226). This, continued Lord Atkin, was the same as the definition of "fundamental fact" in cases of mutual mistake[51] and it was on the application of this test that Lord Atkin ultimately rested his decision. Lord Thankerton, at p. 286, did no more than discuss the nature of "fundamental fact" in contractual mistake. In the judgments of neither Lord Atkin nor Lord Thankerton is there to be found that severe curtailment of the function of the common law of contractual mistake which is the primary feature of Denning L.J.'s restatement.

[49] (1871) L.R. 6 Q.B. 597.

[50] 13 M.L.R. 50

[51] [1932] A.C. at 226–7. Denning L.J. is to the contrary in *Leaf's Case*, *supra*, at 94. How this clash is to be resolved, how the "fundamental fact" of the common law and, in my submission, equity rules of mistake is to be related to the "substantial and fundamental matter" of the condition (*Benston* v. *Taylor* [1893] 2 Q.B. 281) save on the footing of equivalence is a problem that must be left to the future. Take a situation like that in *Leaf*. If a condition—"fact" is "fundamental" in the contractual mistake sense, then an innocent misrepresentation which amounts also to a (broken) condition involves automatically a bilateral mistake regarding a fundamental fact and the contract is void *ab initio* at common law or voidable *ab initio* in equity. *Quaere*, the effect of Sale of Goods Act, 1893, ss. 11 (1) (c) and 61 (2) where contract already executed?

If the above analysis be a true one, it is respectfully submitted that Denning L.J.'s restatement constitutes a novel departure point in the development of the law of contractual mistake, the value of which now falls to be considered.

As already foreshadowed, the originality and gravamen of the restatement consists in the attempt made to redraw on the territory of contractual mistake the boundary line between common law, on the one side, and equity, fraud and breach of condition, or, substantially, equity, on the other. It is a line which, the state of equity and common law in contractual mistake requires, must touch two points. First, it is necessary to consider the fundamental relationship between common law and equity in this legal sector; thus why was common law applied in *Cundy* v. *Lindsay* [52] to the exclusion of equity, and why in *Solle* was the lessor limited to his equitable rights and not given the great advantage of his rights at common law? Secondly, if the definition of the fundamental relationship accords a place to both common law and equity in contractual mistake, it is necessary to consider how this territory is divided between the two legal blocs, whether their respective areas are more or less equal or whether the one predominates over the other.

The fundamental relationship question received at Denning L.J.'s hands two separate answers that are open to strong criticism. First, certain words employed by the learned Lord Justice suggest that, before 1875, courts of equity would take it for granted that the common law did not apply to the particular case in hand—*semble*—by the fact that the plaintiff had seen fit to bring his case in equity. Thus: "whilst *presupposing* that a contract was good at law or at any rate not void, the court of equity would often relieve a party from the consequences of his own mistake so long as it could do so without injustice to third parties." [53] For a policy of this kind in the equity courts there is virtually not a scintilla of authority.[54] Equity courts did not, it is true, trouble themselves about whether or no the contract before them was void at common law but this apparent indifference was a very different attitude from the positive policy of presupposition indicated in the above passage.

Other words used by Denning L.J. suggest another conception, namely, that before applying equitable rules to any contractual mistake, courts of equity would assure themselves, to begin with, that the mistake had not rendered the contract void at common law. Thus, in referring to the type of mistake made in *Cooper* v. *Phibbs*, Denning L.J. said: "The mistake there as to the title to the fishery did not render the tenancy agreement a nullity. If it had the contract would have been void at law from the beginning

[52] (1878) 3 A.C. 459.
[53] *Supra*, 692. Italics added.
[54] *Cf. Scott* v. *Coulson*, *supra*, 252 and text to n. 44, *infra*; also, Smith, *Leading Cases*, 13th ed., Vol. 2, at p. 100.

and equity would have had to follow the law. There would have been no contract to set aside and no terms to impose. The House of Lords, however, held that the mistake was *only* such as to make it voidable, or, in Lord Westbury's words 'liable to be set aside' on such terms as the court thought fit to impose; and it was so set aside." [55] In fact, there is no trace in any of the mistake cases that the courts of equity ever gratuitously decided that a contract was not void for mistake at common law before applying equity. Whether before or since 1875 the application of common law or equity to mistake situations has been determined, formerly, by which court the action was brought in, and, latterly, with the possible exception of *Solle* v. *Butcher*,[56] by the nature of the parties' arguments, and the one or the other appears to have been invoked by the parties according to the convenience of the case. Furthermore, it is simply inaccurate to say that the House of Lords in *Cooper* v. *Phibbs* held that the contract was "only" voidable: the plaintiff in that case asserted that the contract was voidable in equity and the court held it to be so without the significant modification which Denning L.J. imported.

Denning L.J.'s reading, then, of the fundamental common law-equity relationship in contractual mistake leaves a place for both systems of case law. The more substantial part of the learned Lord Justice's restatement is directed to drawing, or rather, revising, the area of contractual mistake covered respectively by each. A beginning may be made by citing the following passage: "Since the fusion of law and equity . . . it will be found that only those contracts are now held void in which the mistake was such as to prevent the formation of any contract at all." [57] These words, it is plain, beg the question as to when the formation of a contract is prevented by a mistake. In elaborating this thought, Denning L.J. went on with the nuclear passage already cited, part of which may conveniently be repeated now": . . . once a contract has been made, that is to say, once the parties, whatever their inmost states of mind, have to all outward appearances agreed with sufficient certainty in the same terms on the same subject-matter then the contract is good unless and until it is set aside for failure of some condition on which the existence of the contract depends or for fraud, or on some equitable ground." [58] It would follow from this passage, (a) that if the parties have "to all outward appearances" made a contract, the contract cannot be a nullity but may be voidable for one of the reasons given; and, (b) that the common law can operate to vitiate a contract only where there are no

[55] *Supra*, 694.

[56] The *non est factum* cases discussed later also include exceptions, at least since *Hunter* v. *Walters* (1871) 7 Ch.App 75, but only apparent exceptions, for there the equity and common law rules are identical, and—*semble*—firmly welded together.

[57] *Supra*, 691.

[58] *Ibid.*

"outward appearances" of a contract. I would respectfully submit that the initial flaw in this restatement is constituted by the fact that the precise nature of a contract made "to all outward appearances" is left undefined.

From the decided cases it would seem that there are two, perhaps three, classes of contract which might fit Denning L.J.'s "agreement-to-all-outward-appearances" formula. First, contracts where the parties have been both actually and apparently *ad idem* are clearly contracts where the parties have "to all outward appearances agreed with sufficient certainty in the same terms on the same subject-matter." Such mistake contracts have, however, in many cases up to the House of Lords been held to be void for mistake at common law: *e.g.*, *Cox* v. *Prentice*,[59] *Couturier* v. *Hastie*,[60] *Scott* v. *Coulson*.

Similarly, the class of contract in which the parties were not actually *ad idem* but were apparently so because of the mode in which their bargain was expressed might be considered to fall within the terms and meaning of the formula; but, here too, although for reasons discussed elsewhere, the contract in *Smith* v. *Hughes* was held valid, there are many cases of mistake contracts of this kind being held void at common law, like *Raffles* v. *Wichelhaus*,[61] *Scriven* v. *Hindley*[62] and *Hartog* v. *Colin and Shields*.[63] If these are the cases intended by Denning L.J., it is manifest that the learned Lord Justice's formulation fails entirely to harmonise with long-established precedent; and the same observation would hold true if contracts induced by fraud were regarded as contracts where the parties have "to all outward appearances agreed, etc. . . .", and so never void at common law. But, surely, there is an outward appearance of disagreement within the sense of the formula where A induces B to conclude a contract by a fraudulent[64] misrepresentation. If this be so, the common law of mistake would be confined to fraud cases, but then the formula would suffer from a severe internal contradiction, not to mention the additional antagonism to the formula in this respect of well-established decisions.[65]

[59] (1815) 3 M. & S. 344.

[60] (1856) 5 H.L.C. 673. But see the recent Australian case of *McRae* v. *Commonwealth Disposals Commission*, 25 A.L.J. 425, noted in 15 M.L.R. 229, which points up sharply the need for a remedy in tort in Australia as much as in England for loss caused by negligent misstatements as well as suggesting another possible mode of simplifying contractual mistake, *viz.*, by its gradual disintegration into offer and acceptance, implied condition precedent, etc.

[61] (1864) 2 H. & C. 906.

[62] [1918] 3 K.B. 564.

[63] [1939] 3 All E.R. 566.

[64] *Quaere*: and innocent misrepresentation too?

[65] With Denning L.J.'s formula should be constrasted the views regarding *ad idem* and no-*ad idem of* Lindley L.J. in *Hickman* v. *Berens* [1895] 2 Ch. 647, and *Wilding* v. *Sanderson* [1897] 2 Ch. 550; and of Lord Wright in *Munro* v. *Meyer*, *supra*, 833, and *Norwich Union Fire Insurance Society*, *supra*, 463.

Finally, it may be demonstrated that Denning L.J.'s treatment of the substantive division of contractual mistake between common law and equity is inconsistent with his definition of the fundamental common law-equity relationship. For the three categories of contract, namely, where the parties are (i) actually and apparently *ad idem*, (ii) not actually but apparently *ad idem*, and (iii) neither actually nor apparently *ad idem*, cover the whole range of common law mistake cases. Thus, if it be conceded that the "agreement-to-all-outward-appearances" formula covers all three categories, the irresistible conclusion is that there is no place at all for the common law rules relating to contractual mistake, which is tantamount to saying that the common law rules have been displaced partly by the law of implied conditions but mainly by the rules of equity. Even if it be said that the formula excludes fraud cases—a difficult contention since fraud cases appear expressly included—the same conclusion would result, though *pro tanto*. Leaving aside the implied condition doctrine upon which I have commented elsewhere,[66] the possible displacement of common law by equity would depend, technically, on the applicability of the principle in section 44 of the Judicature Act, 1925, that, within the sphere of contractual mistake, common law and equity are "in conflict or variance." But, in defining the fundamental relationship between equity and common law, Denning L.J. was at pains to say that, in effect, equity had in the contractual mistake cases come to fill out the law and not to replace it, a reservation which breaks the cohesion of the total restatement and brings a search for its final meaning up against a blank wall.

But although, as I respectfully submit, the restatement is because of its internal conflicts and conflict with authority unacceptable, the problem of the common law-equity relationship in the contractual mistake field to which it was directed is a real and puzzling one. I would respectfully suggest that the principal reason why the restatement is so dissatisfying lies in the fact that the inquiry into the common law-equity relationship was not pushed far enough: a comparison of the respective scope and coverage of the equity and common law rules was not fully made, the requirements of justice in "third party cases" were not adequately met, and the perplexing fact that given certain situations equity and common law will respectively produce different practical as well as technical results was only partially faced. The remainder of this study is occupied with the exploration of these lines of thought, concluding with an examination of the question whether a "conflict or variance" may be said to exist in this legal sector.

[66] 13 M.L.R. (1950) 63, n. 52

EQUITY FOR COMMON LAW

The first subject for investigation, then, is whether the coverage of the equitable rules and principles governing contractual mistake is at least commensurate with that of the rules and principles at common law.

The pattern of common law rules with which I wish to compare those of equity is the pattern I delineated recently [67]: that, provided the mistake refers to a "fundamental fact," common law gives effect to the mistake and treats the contract as void where the mistake is bilateral [68] or where a unilateral mistake has not been due to the misjudgment or fault of the mistaken party but to some other circumstance by which it was reasonable in a commercial sense that he should have been induced to enter into the contract, *viz.*, at present, (i) the fraudulent misrepresentation of the other party, or (ii) a third party's act or some fact or occurrence apart from a person's conduct, or (iii) a pure accident giving rise to an error in the terms of the offer known to the offeree.

With regard to the case of bilateral mistake, it has already been mentioned that the equity rule is, apart from remedy, identical with that at common law [69] and might therefore readily displace the latter. But, as already indicated, such displacement would not relieve the courts of the present task of defining a "fundamental fact." Owing to the bias of past litigation, while the definition of "fundamental fact" has, at common law, been tightly stuffed with meaning, it has in equity received only a meagre content. Accordingly, in fusing the two systems this corpus of common law learning would properly have to be taken over into equity. The equitable rules relating to bilateral mistake do, of course, stretch beyond the ambit of those at common law, in that an innocent misrepresentation will render a contract voidable even though it refers to a "collateral" fact,[70] and, in certain classes of cases, a contract will in equity be set aside where the bilateral mistake refers to a matter of law. But these extended applications serve only to emphasise the facility with which the substitution might be made.

Turning to the unilateral mistake heading (i) above, it needs simply to be mentioned first that equity (like common law) sets aside contracts where the fraudulent misrepresentation refers only to a "collateral" as well as a "fundamental" fact. Much more, however, needs to be said about the *non est factum* cases, or the

[67] *Ibid* 59–62.

[68] Including, of course, cases of innocent misrepresentation.

[69] *Supra*, nn. 26 and 40, and text thereto.

[70] Some controversy regarding this point still lingers · see Benjamin, *Sale*, 5th ed., 495, and books referred to therein at n. (*m*); also Benjamin, 6th ed., 455 and n. (*m*) there. The modern works favour the view in the text above: Pollock: *op. cit.*, 459–60 Chitty. *op. cit.*, 599–46 *sub silentio*; Cheshire & Fifoot, *Contracts*, 2nd ed , 198; Anson, *Contracts*, 19th ed , 174–5, Leake: *op. cit.*, 258–9; Halsbury, *op. cit.*, 52–3; Ashburner, *Equity*, 2nd ed., 279; and, by strong implication, *Gilchester Properties, Ltd.* v. *Gomm* [1948] 1 All E.R. 493. *Cf.* also, *Redgrave* v *Hurd* (1881) 20 Ch.D. 12–18.

cases involving a unilateral mistake that relates to the nature of the entire transaction. These, it is true, are not of necessity fraud cases,[71] but, as the litigation has been concerned exclusively with fraudulently induced mistakes, they may conveniently be discussed at this point. Many of these cases involve situations in which the fraudulent misrepresentee has been induced to enter, through his signature, into contractual relations with an innocent third party either originally or ultimately.[72] It is, therefore, of the essence of these cases that to escape liability the misrepresentee must be able to show the contract to be void *ab initio* and not merely voidable. Hence, at first thought, it would seem as though the *non est factum* rule were peculiar to common law. To the contrary, however, a reading of the cases shows that where a signature is obtained in the stock way, the resultant agreement is in equity as well as at common law void *ab initio*. The equitable rule has paralleled the common law; indeed, since *Hunter* v. *Walters*,[73] it may be said that the equitable and common law rules have become inextricably intertwined both in regard to the *non est factum* rule and the negotiable instruments exception to that rule.[74] But in whatever manner the matter may be regarded, it is plain that the unilateral mistake heading (i) has its well-established equitable counterpart.

So too, is heading (iii) covered by the rules of equity: *Hartog* v. *Colin and Shields*[75] is matched by *Webster* v. *Cecil*.[76] Whether in equity a unilateral mistake of this sort must refer to a fact that is "fundamental" for the purposes of rescission, has not been litigated, and remains, therefore, uncertain.

Heading (ii) gives rise to more obstinate difficulties: " . . . the general authority of a court of equity is to relieve against any cases of fraud, trust, accident or mistake," [76] but, however strong equity's capacity to develop may have been in the seventeenth and eighteenth centuries, it has long since become clear that its dynamic has been reduced to the steady, sober pace set by the doctrine of precedent. Whether because of a desire for a greater appearance of certainty, or because of judicial caution in the face of the increasing mass and complexity of case law, or, as recently urged, because of the inhibitive

[71] *Cf.* the matrimonial cases of *Newman* v. *Newman* (1928) *Times*, October 15, and *Kelly* v. *Kelly* (1932) 49 T.L.R. 99.

[72] *Originally*: *Thoroughgood's Case* (1581–82) 2 Co.Rep. 9b; *Lee* v. *Angas* (1866) 7 Ch.App. 79 n (8); *Ogilvie* v. *Jeafferson* (1859) 2 Giff. 358; *King* v *Smith* [1900] 2 Ch. 425; *Howatson* v. *Webb* [1907] 1 Ch. 537, [1908] Ch. 1; *Carlisle & Cumberland Banking Co.* v. *Bragg* [1911] 1 K.B 489.

Ultimately: *Foxley* v. *Cooke* (1857) 1 Giff. 230; *Foster* v. *Mackinnon* (1869) L.R. 4 C.P. 704; *Hunter* v. *Walters*, *supra*; *National Provincial Bank* v *Jackson* (1886) 33 Ch.D. 1; *Lloyds Bank* v. *Bullock* [1896] 2 Ch. 192; *Lewis* v. *Clay* (1897) 67 L J.Q B 224.

[73] *Supra*

[74] See arguments and judgment in *Hunter* v. *Walters*, *ibid.*; *National Provincial Bank* v. *Jackson*, *supra*; *Howatson* v. *Webb*. *supra*; *Carlisle*, *etc.* v. *Bragg*, *supra*; *Blay* v. *Pollard* [1930] 1 K.B. 628.

[75] [1939] 3 All E.R. 566; (1851) 30 Beav. 62. See 18 M.L.R. 61–62

[76] *Cf. Irnham* v *Child* (1781) 1 Bro.C.C. 93 And works, like *Story on Equity*, generally.

effect of section 25 (11) of the Judicature Act, 1878,[77] the course of equitable development now runs within the "course of the decisions."[78] A situation like that in *Scriven* v. *Hindley* is not quite covered by any specific discrete rule of equity, nor does any equity case constitute a clear precedent-analogy. The auctioneer's catalogue in *Scriven* did not exactly amount to an innocent misrepresentation. The bargain was not an "unconscionable" one in the sense of equity cases like *Wood* v. *Abrey*,[79] *Clark* v. *Malpas*,[80] or *Fry* v. *Lane*[81]; it did not involve a "surprise" as defined by the cases in equity of *Evans* v. *Llewellin*,[82] *Bath and Montague's Case*,[83] or *Willans* v. *Willans*.[84] On the other hand, the purchaser in *Scriven* did not reasonably lack diligence and so could not be said to be estoppable in accordance with equitable cases like *Calverley* v. *Williams*,[85] *Wason* v. *Wareing*,[86] or *Tamplin* v. *James*.[87] Perhaps the nearest precedent would be that of *Torrance* v. *Bolton*,[88] where the short facts were that a property was authorised to be auctioned as an "immediate absolute reversion." No conditions of sale were printed or circulated among the prospective bidders but provisions of sale were simply read out in the auction-room just before the sale commenced revealing the property to be subject to three mortgages. The purchaser, who was deaf, bid for the property as unincumbered and consequently purchased it at an excessive price. After the contract was concluded but before completion he sought rescission. The court held that in relying on the terms of the advertisement and in making no further inquiries the purchaser acted like a "prudent man,"[89] and the court affirmed the decree of rescission previously granted by the Vice-Chancellor. James and Mellish L.JJ., commenting on the description in the advertisement, said that it "was calculated, if not intended, to entrap or mislead persons who would thereby be entrapped into the auction-room."[90] Nevertheless, the court did not go so far as to call the advertisement a fraud *stricto sensu*, but affirmed the V.-C.'s decree on the ground that the indirect deception effected made it unconscionable for the vendor to avail himself of the legal advantage he had obtained. The moral obliquity of the vendor in *Torrance*, however, was clearly greater than in *Scriven*. Similarly, again, in the equity case of

[77] Dr. O. R. Marshall: "Anachronisms in Equity," 1950 *Current Legal Problems*, 33 *et seq.*
[78] W. H. D. Winder. "Precedent in Equity," 57 L.Q.R (1941), 247 *et seq*
[79] (1818) 3 Madd. 417.
[80] (1862) 4 De G.F & J. 401
[81] (1888) 40 Ch.D. 312.
[82] (1787) 2 Bro.C.C. 150; 1 Cox 389.
[83] (1693) 3 Cas. in Ch. 55.
[84] (1809–10) 16 Ves. 72.
[85] (1790) 1 Ves.Jun. 210.
[86] (1852) 15 Beav. 151.
[87] (1880) 15 Ch D. 215.
[88] (1872) L.R. 8 Ch App. 118.
[89] *Ibid.*, 123.
[90] *Ibid.*

M'Carthy v. *Decaix*[91] the defendant was guilty of moral fault, short of fraud *stricto sensu*, but greater than in *Scriven*. On the other hand, no equity court has ever yet had occasion to refuse relief in a situation of the *Scriven* type.

The common law remedy for a situation like that in *Thornton* v. *Kempster*[92] is not as difficult to translate into equity as that in *Scriven*, the nearest equitable analogy being *Lansdowne* v. *Lansdowne*. In the latter case, it is true, the mistake was bilateral and one of law, but, here, it is submitted, neither distinction would be material, the overriding similarity being the mistake induced by the act of a third party which threatened the misled party with an unjust hardship.

Whether the general equitable principle stated in *Irnham* v. *Child*[93] might be given an additional application to a *Scriven* situation would depend partly on the existing dynamic in the body of equity, and partly on the creative inclination of the judges administering equity, that is, on their inclination to take advantage of the malleability of the concept in law. As already mentioned, the course of the decisions and doctrine of precedent dictate at the moment, the speed at which equity may develop, but there is nothing in legal history to show that a "mechanical"[94] period in the growth of a particular segment of the law is, once it sets in, eternal. If legal history has anything to teach, it is that the legal world is an expanding universe. It is only the rate of expansion that has varied from period to period, from the sluggish movement of the feudal age to the great acceleration that has occurred in modern times. The instruments, again, of reform and development employed by judges have varied with the diverse impulses of the judges, one of whom at least today has shown himself ready to employ a quickened equity to further the ends of individual justice.[95]

If so sweeping a move were made as the replacement of the common law of contractual mistake by equity, it would probably be found that the slightly difficult position of *Scriven* v. *Hindley* is not irreducible.

On the whole, then, equity does cover the entire common law ground in contractual mistake, so that it is technically feasible to substitute the one for the other without sacrifice of remedy in any particular case and to the greater simplification of the law. It may be added that this result is possible because in relation to the legal problems of defining a "fundamental fact" and deciding, on grounds of convenience and fairness, whether effect should be given

[91] (1831) 2 Russ. & M. 614.
[92] (1814) 5 Taunt. 786.
[93] *Supra*, n. 76.
[94] Hanbury: *Essays in Equity*, 28.
[95] I refer to Denning L.J.: see, *e.g.*, *Central London Property Trust, Ltd* v. *High Trees House, Ltd.* [1947] 1 K.B. 130; *Combe* v. *Combe* [1950] 2 All E.R. 1116.

to a bilateral or unilateral mistake, the approach of both equity and common law has been basically the same. Whether the substitution is one that is practically desirable must now be considered.

THE PRACTICAL CONSEQUENCES

The significant legal differences between common law and equity in contractual mistake are that, on the one hand, a contract is void *ab initio*, on the other, voidable,[96] that, on the one hand, contract-nullity gives rise at common law to total failure of consideration and a simple and rigid reversal of the parties' respective legal positions, whilst, on the other, the process of *restitutio in integrum* is a flexible one, assisted by a sophisticated machinery of adjustment and compensation.

These technical differences, however, produce differences of practical importance in only two classes of cases[97]: where an innocent third party's rights become involved, and where, in cases uncomplicated by the rights of third parties, something more in the

[96] i.e., voidable *ab initio* The fact that the contract will be rescinded as from the beginning has had, owing to the *restitutio in integrum* rule and the general rules protecting third parties, no practical consequences until *Solle* v. *Butcher*. In the latter, it was because the lease was avoided as from the beginning and not from the commencement of action that no over-payment of rent in the period prior to action occurred and was repayable. There being no lease from the beginning, there existed no agreed or "standard" rent, as between the parties.

[97] In insurance law, whether a misrepresentation, fraudulent or innocent, refers to a "fundamental" fact or not is immaterial; the difference between contract-nullity and contract-voidability, between the rigid remedy and the flexible, developed one is similarly of no importance.

In marine insurance law, innocent or fraudulent misrepresentations vitiate the policy and the premium is returnable as for total failure of consideration unless the fraud was that of the insurer: Arnould, *Marine Insurance*, §§ 587, 1247, 1247a, 1256. Note *Anderson* v. *Thornton* (1853) 8 Ex. 425, 427–8.

In non-marine, general insurance law, the net result is the same, though with some slight confusion of theoretical basis. In *Duffell* v *Wilson* (1808) 1 Camp. 401; *London Assurance* v. *Mansell* (1879) 11 Ch.D. 363; *Biggar* v. *Royal Life Assurance* [1902] 1 K.B. 516, and *Joel* v *Law Union and Crown Insurance* [1908] 2 K.B. 481, the contract of insurance was held "void," in the last case for innocent, in the rest for fraudulent misrepresentation. In all restitution was ordered simply, but, in *Joel*, the feasibility of *restitutio* was regarded as a serious pre-condition to setting aside the contract, though described as "void"; *supra*, at 489–40. In *Kettlewell* v. *Refuge Assurance* [1908] 1 K.B. 545, decided in the C.A. before *Joel* but approved without reservation or qualification by the House of Lords after *Joel* in [1909] A.C. 245, and therefore the latest pronouncement on this point, the court held premiums recoverable by insuree who had been the victim of insurer's agent's fraud The C.A. divided in its reasoning: Alverstone C.J. apart from thinking the premiums were recoverable at common law as damages in deceit (at 550), principally averred that, though the contract was only "voidable" and the insurer had therefore entered upon risk, one could not speak of "a mere risk of that kind, which has not produced any benefit in fact to the assured as being a part performance" (at. 549). President Gorell Barnes thought that the insuree had the right, as the contract was "voidable," "to declare the contract void" (at 551) from, in effect, the very beginning. Buckley L.J. (who dissented) said that, as the contract was only "voidable" the insurer had been "at risk" and had therefore given sufficient consideration to block the return of premiums as money had and received to insuree's use (at 552–3). See also MacGillivray, *Insurance Law*, 3rd ed., 1217–26.

way of compensation and adjustment of rights is demanded by the justice of the case than a simple reversal of the parties' positions.

The Third Party Cases

The relevant cases so far litigated belong exclusively to the province of the law of sale of goods.[**] The difference in such cases between applying common law or equity, the difference that is to say made by the contract being voidable instead of void, is straightforward and decisive. The one body of law involves the unmodified operation of primary rules of title and the third party acquires no ownership: *nemo dat quod non habet*; the other enables the logic of those primary rules to be brushed aside and the third party is protected. The ultimate reason for by-passing the primary rules of title in commercial law is rooted in considerations of public policy, which have so far precipitated at least four heads in this respect: first, the need in appropriate cases to secure uniformity between national bodies of commercial law,[**] and second, the minimising of impediments to the due administration of justice,[1] neither of which are here relevant, third, the current judicial idea of commercial convenience and, fourth, the current judicial notion of fault-liability. So, whether the substitution of equity for common law in fundamental mistake cases is desirable will depend on the dictates of commercial convenience and/or the principle of fault-liability, as currently conceived.[2] From another aspect, the problem may be put as whether or not it is desirable that there should be extended to third party mistake cases the doctrine of the negotiability of chattels that is at present compounded of (i) in relation to the law of bills of lading, section 47 of the Sale of Goods Act, 1893, to which might possibly be added, section 8 of the Bills of Lading Act, 1855, and the conclusive presumptions in favour of an endorsee for value or person rightfully presenting and taking delivery under a bill created by the words, "Shipped in good order and condition,"[3] or, "shipped in apparent good order and condition,"[4] or by a statement in a bill that freight had been paid in advance,[5] (ii) the rule of ostensible authority in agency and partnership law, and (iii) the doctrine of estoppel as exemplified specifically in such cases as *Woodley* v. *Coventry*,[6]

[**] Third party cases in the *non est factum* series are not here relevant for reasons already discussed, *supra*.

[**] *Cf.* debate on Factors Act, 1828, in *Hansard*, 1828, Vol. 9, col 211.

[1] Illustrated by the Bankruptcy and Deeds of Arrangement Act. 1913, s. 15; see *Curtis* v. *Maloney* [1950] 2 All E.R. 982.

[2] Harvey, *Victims of Fraud*, discusses the place of this idea in (inter alia) commercial law in some detail though unsatisfactorily. *Cf.* also an expression of the idea in the overwide and much reiterated dictum of Ashurst J. in *Lickbarrow* v. *Mason* (1787) 2 T.R. 70.

[3] *Cf. Compania Naviera, etc.* v. *Churchill, etc* [1906] 1 K.B. 237.

[4] *Cf. Brandt* v *Liverpool, etc., S. N. Co.* [1924] 1 K.B. 575.

[5] *Cf. Howard* v. *Tucker* (1831) 1 B. & Ad. 712. Similarly, "the conclusive evidence clause". Scrutton, *Charterparties*, 15th ed., 71.

[6] (1863) 2 H. & C. 164.

Pickard v. *Sears*,[7] and *Commonwealth Trust* v. *Akotey*,[8] (iv) the "reputed ownership" section 38 of the Bankruptcy Act, 1914, (v) the "apparent possession" rule in the Bills of Sale Act, 1878, ss. 4 and 8, (vi) the rules regarding the class of sales referred to in the Sale of Goods Act, 1893, s. 21 (2) (*b*),[9] (vii) sections 22–26 of the 1893 Act, (viii) the provisions of the Factors Act, 1889, regulating the power of pledge and disposition of mercantile agents, and (ix) certain special Acts conferring the quality of negotiability upon certain otherwise non-negotiable documents of title to goods used in particular localities[10] or by particular organisations.[11]

Confining one's attention here to the third party cases involved in the agency rules above, the rules regarding bills of lading, sections 22–25 of the 1893 Act and the fundamental mistake cases, the ground of commercial convenience in this regard has been judicially specified, in gist, as follows[12]: that the pursuit and recovery of goods through any number, it might be, of bona fide purchasers would be a great inconvenience and an impediment to trade not merely because of the dislocation in the particular transactions undone but because this kind of dislocation must tend to undermine the confidence of the business community. For this tendency in fact to be produced, it is necessary, in my opinion, that either of two conditions be fulfilled: the confidence of the business community would be seriously shaken if the kind of commercial transaction undone is of substantial importance in the branch of commerce to which it belongs and/or the transaction and its dislocation recur with sufficient frequency to make the possibility of dislocation an overshadowing fear in the minds of businessmen. The classical illustration of the validity of these conditions is afforded by the principle of negotiability as manifested in the law of negotiable instruments. In the sphere of chattels law here discussed, both conditions are fulfilled in the case of the ostensible authority rule and Factors Act provisions, by dint of the central function and multiplicity of activity of the agent in commerce and the apparently high incidence of commercial fraud among mercantile agents at least in the nineteenth century.[13] The first condition at any rate is fulfilled in the case of section 26 of the Sale of Goods Act, and again in the case of bills of lading and sections 23 and 25 of the Sale of Goods Act, in view of the need for certainty and of the importance of being able to rely on the face value of title-documents in international commercial

[7] (1887) 6 A. & E. 469.
[8] [1926] A.C. 72.
[9] See cases cited in Chalmers, *Sale of Goods*, 12th ed., 82 n. (*m*).
[10] Thus, the Mersey Docks Acts Consolidation Act, 1858, s. 200, and Port of London (Consolidation) Act, 1920, ss. 166–8.
[11] Thus, the Trafford Park Act, 1904, ss. 33–5, and Liverpool Mineral and Metal Storage Co., Ltd. (Delivery Warrants) Act, 1921, ss. 3, 4 & 9. See Purchase, *Documents of Title to Goods*, 223–6.
[12] *White* v. *Garden* (1851) 10 C.B. 919, 928 (Jervis C.J.).
[13] From the quantity of litigation: see Purchase, *op. cit.*, Chaps. 6 & 7. No other kind of quantified data, of course, exists.

transactions and other commercial transactions in bulk or bulky commodities. But the detailed pursuance of these matters is not appropriate here. The rule in *market overt*, too, is not the special concern of the present discussion, though one might say with some certainty that, save possibly in the case of some local out-of-the-way markets, *market overt* fulfils neither of the conditions and is quite unsupportable nowadays by considerations of commercial convenience.[14]

Turning to the third party mistake cases, three features are clear: first, they rarely occur[15]; second, no major institution or branch of trade hinges upon the fact that the law of fundamental mistake might deprive a third party of his purchase; and, third, it seems true to say, from the lack of agitation in business circles and from personal experience and observation, that the possibility that a third party might be deprived in this way in no wise affects the course and volume of business by transferring the businessman's anxiety regarding the soundness of his transaction from the commercial risk involved to the possibility of title risk. Conversely, if the common law of mistake gave way to equity, the possibility that vendors might suffer loss in such cases would form no impediment to business. Already, indeed, vendors labour under a measurable burden of title risk in their transactions by virtue of the pertinent rules of the negotiability of chattels doctrine, but it is never argued that this title risk that vendors run impedes business. The additional weight of risk resulting from the third party mistake cases would, if only because of their rarity, be negligible. It follows, in other words, that in this respect the significance of the mistake cases is that they are commercially insignificant.[16]

The way, is, therefore, left open for a legal formula which will enable the courts to attend to the needs of individual justice in each isolated case, a formula centred upon the current notion of fault liability. In *Solle* v. *Butcher*, Denning L.J. in alleging that the common law doctrine of mistake had been extended beyond its "proper limits,"[17] described this as "a process which was capable of being attended with much injustice to third persons who had bought goods or otherwise committed themselves on the faith that there was a contract,"[18] adding, "In the well-known case of *Cundy*

[14] *Cf.* Pollock in 8 L.Q.R. (1892) 105–6, and *Bishopsgate Motor Finance Corporation* v. *Transport & Brakes, Ltd.* [1949] 1 K.B. 322.

[15] I have been able to count only four in the past eighty-eight years: *Hardman* v. *Booth*, *supra*; *Hollins* v. *Fowler* (1875) L.R. 7 H.L. 757; *Cundy* v. *Lindsay*, *supra*; and *King's Norton Metal Co.* v. *Edridge*, *supra*. *Phillips* v. *Brooks* [1919] 2 K.B. 243, can no longer be regarded as such a case: *cf.* 18 M.L.R. 66.

[16] The argument that mistake cases ought to continue the logical tendency of the negotiability of chattels doctrine may be answered by saying that, subject to overriding commercial needs not present in the mistake cases, the justice of each case should be regarded in preference to the attainment of symmetry in commercial law.

[17] *Supra*, 691.

[18] *Ibid.*

v. *Lindsay*, Cundy suffered such an injustice."[19] However apt Denning L.J.'s concern may be in the particular instance of *Cundy* v. *Lindsay*, the simple substitution of contract-voidability for contract-nullity, that is to say, the simple favouring of the third party exclusively in mistake cases would not necessarily create the conditions in which justice would always be done. The simple operation of the primary rules of title is here unjust in that these rules take no account of the fault of either party in a situation in which one party alone may be at fault, or there may be bilateral fault or indeed bilateral no-fault. Thus, while, it is true, no reported mistake case has involved a situation in which the third party was more at fault than the original vendor, at least three cases show facts in which the original vendor, assuming his standard of care to be no more than that of a reasonably prudent businessman, was at any rate equally as innocent as the third party: *viz.*, *Hardman* v. *Booth*,[20] *Hollins* v. *Fowler*[21] and *King's Norton Metal Co.* v. *Edridge*.[22] In such cases as these it is just as unfair to protect the possession of the third party simply as to restore possession simply to the original vendor. The simple, constant protection of the third party in such cases smacks of a win-or-lose, all or nothing, untwentieth century crudeness. Somewhat more refined is the proposal of certain learned writers that the doctrine of estoppel be applied against the original vendor where he is, in a practical commercial sense, negligent.[23] This rule too, in the present context, suffers from the defect of failing to provide adequately for the possibilities of equal fault or equal no-fault.

Clearly, I think, the third party mistake situations afford a suitable case for the extension to them of the principle of apportionment of damages that recently was introduced with so much benefit into the general law of tort.[24] In the present context, it might take the form of some such rule as that the third party is vested with a right to retain or return the goods subject to the apportionment between them of the total loss suffered by the original vendor and third party in proportion to their respective commercial fault.[25] But a rule of this kind would require legislative introduction.

Here, the simple replacement of common law by equity, of contract-nullity by contract-voidability, would do no harm, but no other good than the rationalisation of systems.

[19] *Ibid.*
[20] *Supra.*
[21] *Supra.*
[22] *Supra.*
[23] Cheshire & Fifoot, *Law of Contract*, 2nd ed., 179–80
[24] Law Reform (Contributory Negligence) Act, 1945.
[25] See also the suggestion made in *The Reform of the Law* (ed.. Professor Glanville Williams), at 73. As already mentioned, in the *non est factum* third party cases, the substitution of equity for common law would simply preserve the *status quo*. Apart, however, from the negotiable instruments cases where commercial convenience is overriding, the apportionment principle might with advantage be applied to relevant *non est factum* situations.

Cases Requiring Adjustment and Compensation

It is in those cases where a somewhat complicated readjustment between contracting parties is necessary to achieve a fair result to the dispute between them that the superior quality of the remedy in equity is thrown into high relief and the substitution of equitable for common law rules would produce the most beneficial consequences.

Socially speaking, the most important illustration of this theme up to the present time is that embodied in *Solle* v. *Butcher* itself.[26] The bilateral mistake there regarding the vital quality of the subject-matter or the "fundamental" right to charge the higher rent was, in my respectful submission, sufficient, technically, to render the lease void *ab initio* at common law.[27] The effect of this would have been to preclude the initial creation of a contractual tenancy and so strip the putative tenant of the protection of the Rent Restriction Acts.[28] The putative tenant, now licensee, would then have been rightfully ejectable by the lessor and—the significant point—it would not have lain with the court to attach conditions to the common law remedy. It requires only a slight exercise of the imagination to envisage the harmful consequences of imposing the rigid common law rule on this highly specialised part of the environment of planning law. Thus, it might have been the case of the landlord taking advantage of his strict common law right in order to obtain vacant possession of his premises. Further, other "facts" under the Rent Restriction Acts come to mind that might be argued as "fundamental" in the common law-equity sense, like "dwelling-

[26] *Cooper* v. *Phibbs*, was, in its day, another example. Thus, the bilateral mistake made in *Cooper* regarding the title to the land leased might well at common law have made the lease void *ab initio*, as a mistake referring to a "fundamental fact" (*pace* Denning L.J. *Solle*, *supra*, 694. But *pro.*, Lord Wright, *Norwich Union Fire Insurance*, *supra*, 463, and Lords Atkin and Thankerton, *Bell* v. *Lever Bros.*, *supra*, 218, 253–6). In that event, the mistaken lessee would have been affirmed in his rightful position as tenant for life, but as it would not have been open to a common law court to grant a compensatory equitable lien in favour of the mistaken lessors, the appellant would have received for nothing the improvements made by respondents' father under a mistaken impression that he was the owner in fee simple. The machinery of adjustment and compensation of which the court of equity disposed enabled it to reach a juster conclusion. Today, however, it would be possible in a court of amalgamated jurisdiction to counterclaim the equitable lien in the common law action. Similarly, in *Hart* v. *Swaine*, *supra*, a claim for an account would today be possible though the action were founded on a fundamental mistake at common law.

However, in *Allcard* v. *Walker*, *supra*, where the terms attached could not form a proper subject for a claim or counterclaim in equity, it would appear that if, as a matter of pure hypothesis, it had been sought to set aside the consent order as being void at common law for fundamental mistake, the terms in question could not have been attached to the judgment and an element of justice would have been lacking.

[27] See nn. 26, 27, 42 and 45, *supra*, and discussion in text.

[28] Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15, and commentary thereon in Megarry, *op. cit.*, or "Law Notes," *op. cit.*

house "[29] and "furnished "[30] dwelling-house, "rateable value "[31] or "standard rent."[32] Assuming that the courts accepted such "facts" as these as "fundamental" and assuming, additionally, a set of circumstances rendering it unavoidable that the court give effect to the mistake in question,[33] then the putative tenant's security of tenure, which is one of the cardinal aims of the rent restriction statutes, would be uncatastrophically but to a measurable degree impaired.

Both Denning[34] and Jenkins L.JJ. showed themselves fully conscious of this danger, the former for the right, the latter, with great respect, for the wrong reason. Jenkins L.J. said: "If the landlord could procure rescission of the tenancy merely by alleging and proving that he and the tenant entered into the tenancy under a mutual mistake to the effect that the Acts imposed no restrictions on the rent which could legally be charged, the whole object of the Acts would . . . be frustrated in such a case. . . . If when a tenant claims his rights under the Acts the landlord can say, "We neither of us knew the Acts applied," or "We both thought the Acts did not apply," and threaten rescission, the tenant must either risk rescission and consequent ejectment or else submit to pay whatever the landlord demands as consideration for renouncing his right to rescind."[35] Whether Jenkins L.J. was influenced in his finding of mistake of law by this looming danger, or not at all, can only be matter for surmise. In my respectful opinion, however, one of the most significant features of *Solle* v. *Butcher* and the point overlooked by Jenkins L.J. was that justice was done in *Solle*,[36] that, though the lease was rescinded, there followed no "consequent ejectment" because the majority decision was founded upon the equitable rules and not those of common law.

So, in equity, the lease was voidable *ab initio* with the result that, once rescinded, the contractual tenancy was as though it had never been.[37] But the residuary discretion of which the court disposed enabled it to secure the licensee, no longer protected by the Acts, in his tenure, and the lessor in the higher rent which but for the mistake he would have been entitled to charge.

While it would appear from the reported judgments and arguments of counsel that *Solle* was confined to the considerations in equity alone, it does seem to follow, in my opinion, from the extract

[29] 1920 Act, s. 12 (2) and case-law gloss. See works cited in previous note.
[30] 1920 Act, s. 12 (2), Rent, etc., Restrictions (Amendment) Act, 1923, s. 10 (1), and Rent, etc., Restrictions Act, 1939, s. 8 (2).
[31] 1920 Act, s. 12 (1), as amended by 1939 Act, First Sched.
[32] *Ibid.*
[33] In accordance with the rules making up what I called in my previous article the Principle of Objective Appearances.
[34] *Supra*, 692.
[35] *Supra*, 706.
[36] *Pace*, Professor Goodhart, 66 L.Q.R. (1950) 178.
[37] *Semble*, assumed in the judgments; explicit in extract from the record of the post-judgment discussion between court and counsel quoted later in text above.

below of the record of the arguments between court and counsel after judgment given, that the common law aspect of the case too had been submitted to the court:

"Mr. Levy: The position would appear to be that the lease was not void *ab initio*, but, having been avoided, that operates from the moment of its grant and, therefore, there has been no rent at all of these premises in the course of the occupation by the plaintiff. He has been occupying as a licensee pure and simple, subject to the payment of a certain sum annually, namely, £250 . . . Lord Justice Denning: Those are substantially the terms . . ." [38]

If the common law case also was urged, then, because of the divergent consequences of applying common law or equity, a criterion for selecting between the two sets of rules became vital to the decision of the case. In that event, the criterion Denning L.J. formulated in the shape of his restatement ought justly to be regarded as forming part of the *ratio decidendi* of the learned Lord Justice. If, however, my submission be sound that the "agreement-to-all-outward-appearances" criterion of Denning L.J. is fallacious, it becomes extremely difficult to see what resistance a court could legitimately offer to a landlord who persisted in demanding his common law right, apart from a finding in that case of mistake of law or of "collateral" fact or a bilateral mistake impliedly absolute and unconditional [39]; or unless equity is indeed in this sphere paramount to common law, which leads to the nuclear issue of whether, in the sphere of contractual mistake "any conflict or variance exists between the rules of equity and the rules of common law with reference to the same matter." [40]

"CONFLICT OR VARIANCE?"

The perplexing feature of the common law-equity relationship in this regard is that, whilst nearly all judicial references in this field are to the concurrent nature of the jurisdiction and some, in the post–1875 cases, expressly postulate a parallelism between the common law and equity rules, the hard fact remains that there is a difference between the legal consequences of applying equity or common law to the facts of the same mistake situation in at any rate two types of cases and that the difference in consequence is not only theoretical but practical.

A review of the technical arguments against the existence of a "conflict or variance" in contractual mistake might commence with the observation that, at common law, a contract induced by a fraudulent misrepresentation relating to a "fundamental fact" is

[38] From p. 22 of a typescript copy of the judgment in *Solle* v. *Butcher*, dated November 25, 1949, being a transcript of the shorthand notes of Barnet, Lenton & Co., 46–7 Chancery Lane, London, W.C.2.

[39] *Cf.* 18 M.L.R. 59–60, and Professor Goodhart's hypothetical Whitacre oil well case in 66 L.Q.R. (1950) 170.

[40] Judicature Act, 1925, s. 44.

both voidable for misrepresentation and void for fundamental mistake. Which rule the plaintiff sees fit to invoke will depend on the convenience in his case. In *Cundy* v. *Lindsay*, the plaintiff invoked the fundamental mistake rule, for on that alone could he have won. On the other hand, the plaintiffs in *Gordon* v. *Street* [41] and *Sowler* v. *Potter* [42] hedged their case by arguing the rules in the alternative and the court found the contracts in those cases to be alternatively void and voidable at common law. But whether the existence of rules, both supplementary and to an extent contradictory, at common law is a valid argument in favour of the coexistence of contradictory rules of common law and equity is highly debatable. A more relevant argument is that in the third party cases of *Cundy* v. *Lindsay* and *King's Norton Metal Co.* v. *Edridge*, the courts would, had there been a "conflict" between common law and equity, have been obliged to apply equity and so find against the plaintiff in the former as well as in the latter. That the courts did not do so, it may be argued, constitutes authority *sub silentio* that no "conflict" of the kind discussed exists. To this it may be replied that the weakness and indirectness of an authority *sub silentio* ought not forever to bar the courts from finding a legal "conflict" in cases where a conflict of consequences is so plainly present. Finally, there are the express judicial opinions. *Cochrane* v. *Willis*, *Huddersfield Banking Co.* v. *Lister*, *Scott* v. *Coulson*, and *Norwich Union Fire Insurance Society* v. *Price* were all cases involving a bilateral mistake relating to a "fundamental fact," no third party interests supervening. In all, the courts opined that the contracts in question were both void at common law and voidable in equity. In all, the courts regarded the application of common law and equity as concurrent.[43] In *Scott* v. *Coulson* it was indeed remarked that, as the common law settled the case, "the plaintiffs do not require to have recourse to equity to rescind the contract, if the basis which both parties recognised as the basis is not true." [44] But this remark seems to have gone to the matter of convenience of court argument and not to the matter of principle. From *Cochrane*, however, to *Norwich Union Fire Insurance Society*, no situation was implicated, wherein the difference between applying equity or common law was more than theoretical. It is, in my opinion, another aspect of significance in *Solle* v. *Butcher*, that there, where the difference between applying equity or common law was vital, Denning L.J. who alone of the court met this issue, found it impossible merely to reiterate the parallelism indicated in those previous cases; although, it is true, the learned Lord Justice sought a solution in a

[41] [1899] 2 Q.B. 641.

[42] [1940] 1 K.B. 271.

[43] *Cochrane*, *supra*, 68; *Huddersfield Banking Co.*, *supra*, 281; *Scott*, *supra*, 252, 258 (also Lord Warrington, *Bell* v. *Lever*, *supra*, 206), *Norwich Union Fire Insurance*, *supra*, 462–3 (by clear implication).

[44] *Supra*, 252.

restatement intended to reconcile the divergent rules of common law and equity and not in a finding of "conflict."

The meaning of the "conflict or variance" phrase has never really received in the cases the sharpness of precise definition. There are many illustrations but of no all-embracing test principle. Authority in favour of a "conflict" may begin with Earl Cairns' interpretation of the phrase in *Pugh* v. *Heath*[45] in the well-known words: "The court is now not a court of law or a court of equity; it is a court of complete jurisdiction; and if there were a variance between what, before the Judicature Act, a court of law and a court of equity would have done, the rule of the court of equity must now prevail."[46] Although this definition is defective in that, on its face, it omits to refer to differences due to the supplemental function of equity, like the granting of specific performance where common law disposed only of damages, none the less, whether the definition be applied to contractual mistake cases in a large or in a narrow, literal sense, the result of the application is that a "conflict" there exists.

Again, where a contract is induced by an innocent misrepresentation, relating to a "fact" that is not "fundamental" but "collateral," the common law view is that the contract remains unaffected and valid, whilst in equity the contract is voidable. In the opinion of Jessel M.R. this difference in consequences gave rise to a legal "conflict" for the learned Master of the Rolls in *Redgrave* v. *Hurd*[47] asserted: "As regards the rescission of a contract, there was no doubt a difference which of course has now disappeared by the operation of the Judicature Act, which makes the rules of equity prevail. According to the decisions of courts of equity, it was not necessary, in order to set aside a contract obtained by material false representation, to prove that the party who obtained it knew at the time when the representation was made that it was false. . . . As regards the rule of common law there is no doubt it was not quite so wide."[48] If, then, a "conflict" follows from the disparate consequences of applying equity or common law in such a case, it is, I would submit, strongly arguable by way of analogy that where common law stamps a contract as void and equity the same contract as voidable with a vital difference of practical results, a "conflict" similarly exists.

The other arguments in favour are those to which reference has already been made: that the difference between applying equity or common law is in two classes of cases crucial and that the replacement of the common law of contractual mistake by the

[45] (1882) 7 A.C. 235.
[46] *Ibid.*, 237.
[47] (1881) 20 Ch.D. 1
[48] *Ibid.*, 12–13. If Jessel M.R. is taken—which is exceedingly doubtful—to be referring to innocent misrepresentation regarding "fundamental" facts only, the "conflict" implications of his statement are even wider.

corresponding equitable rules is for three reasons desirable: first, because it would resolve the difficulty in cases like *Solle* v. *Butcher* and would certainly do no more individual injustice than at present in the third party cases; and, secondly, because the residuary discretion it would vest in the courts in all mistake cases would insure against possible, difficult, future contingencies arising, especially, from an increasing volume of planning law; and, thirdly, because it would to a considerable degree simplify the law in that two systems of law would no longer be employed where one is demonstrably enough.

In whatever event, should the landlord in another *Solle* v. *Butcher* insist on his common law rights or counsel for the defendant in another *Cundy* v. *Lindsay* plead that the original contract of sale was only voidable in equity and equity prevails, it will become essential for the courts to solve these puzzling features of the common law-equity relationship in this part of the law. Denning L.J.'s restatement will require a considerable amount of defining and refining before it is satisfactorily usable for the reasons already given that its pith is too vague and runs counter to the established grain of authority. The simple substitution of equity for common law is, in my respectful submission, preferable partly because it would be technically feasible, partly because its consequences are both foreseeable and desirable, partly because what is of value in common law learning would be fused, and finally, because such contrary authority as exists is not so direct or strong that it may not with little strain be overridden.

C. GRUNFELD.*

* Lecturer in Law at the London School of Economics and Political Science.

EQUITABLE ESTOPPEL TODAY

I

WHEN this article was first drafted *Combe* v. *Combe* was unreversed and *Candler* v. *Crane, Christmas & Co.* was unheard of. These decisions occasioned the second draft which, barely completed, was rendered inadequate by Mr. J. F. Wilson's article in the *Law Quarterly Review*. Resolve to begin again coincided more or less with *Mitas* v. *Hyams*, and a belief began to germinate that an alteration had only to be made to this article to evoke, by some kind of telepathy, an important judicial or juristic pronouncement on the subject. The latest of these is Lord Justice Denning's article in this journal: a contribution which is doubly valuable for coming from a lawyer who has been largely responsible for the recent decisions. So rapidly have developments been taking place in this branch of the law that "today" may turn out to be more literal than was at first intended.

George Spencer Bower, in his work on estoppel [1] pours scorn on the term "equitable estoppel" and criticises Lord Selborne [2] for using the expression. In Spencer Bower's view (pp. 16–18), all cases of so-called equitable estoppel fall into one of the following three categories: (1) actions for damages or rescission based on fraudulent misrepresentation; (2) actions to enforce performance of contracts; (3) estoppel where there would also be estoppel at common law. The first two categories are not estoppel, and the third does not merit the adjective "equitable."

Notwithstanding the weight attaching to Spencer Bower's statements, it is submitted that equity has a strong claim to recognition on the subject of estoppel. In the first place, although estoppel by representation has become a feature of the common law,[3] that has happened by way of common law adoption of principles worked out in the Court of Chancery. In the seventeenth century common law, estoppel by representation resulted only from the doing of an act of notoriety, such as livery of seisin [4]—hence the term "estoppel in pais." [5] The Court of Chancery recognised early on

[1] *Law Relating to Estoppel by Representation.* See also *Canadian Pacific Ry.* v. *R.* [1931] A.C. 414, at p. 429.

[2] In *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans* (1873) L.R. 6 H.L. 352, at p. 360.

[3] See W. S. Holdsworth, *History of English Law*, Vol. 9, p. 162: ". . . the root principle of estoppel by conduct was in effect recognised both by the courts of common law and by the court of Chancery in the latter part of the eighteenth century."

[4] Coke's *Institutes*, p 352a; Parke B. in *Lyon* v. *Reed* (1844) 13 M. & W. 285, at p. 309; W. Ashburner, *Principles of Equity*, 2nd ed., p. 445: "Such were livery, entry, acceptance of rent, partition, acceptance of an estate."

[5] Spencer Bower, *op. cit.*, at pp. 4–5, discusses the expression "in pais" or "in pais."

that even informal representations could give rise to estoppel.[6] This doctrine was not introduced into the common law until the late eighteenth century.[7] In the second place, it would appear that equitable estoppel, or at least some allied principle, can come into play in respect of a representation that could not found an estoppel at common law. The estoppel, or quasi-estoppel, or whatever other name will eventually adhere to the *High Trees* cases, which results from a statement of intention, appears from the declarations of its progenitors to be founded in equity. In the third place, there are results of estoppel in equity which do not result from estoppel at common law. In *Hunt* v. *Carew*,[8] for example, the first defendant was seised of an estate for life, with remainder in tail to his son. The plaintiff, thinking the father had an estate of inheritance, approached the son (who was the other defendant) for his assistance in procuring a lease from the father, determinable upon lives, offering a £400 fine and a small yearly rent. The son, who knew the true state of the title, informed the plaintiff that his father had power to make such a lease, the father purported to grant it, and the son received £800 of the fine. It was, however, no part of the agreement that the son should receive this money. When the plaintiff discovered that the father had no power to grant the lease, he brought a bill in Chancery. The court ordered: "That since the plaintiff was not acquainted that the father had exceeded his power, and he relying on the affirmation of the son (who had most of the money) that the lease would be good without his joining, by which he was deceived; that therefore both should join at their own costs to make an assurance, and confirm the lease to the plaintiff during the estate thereby granted."[9] This case does not fall within Spencer Bower's first category, as the claim was for neither damages nor rescission; it does not fall within his second category, as the son made no promise to grant a lease himself, nor did he even warrant that his father could do so; and it did not at the time fall within the third category, as only the father had done an act of a kind which could then result in estoppel at common law; while at no time could a common law court have made an order of the type made in that case. Yet, although there was no mention of the word "estoppel" in *Hunt* v. *Carew*, the principle upon which the case was decided is that underlying estoppel in equity,[10] and no court has decided that the consequences which resulted from that estoppel could not result from equitable estoppel still.

[6] *Hunt* v. *Carew* (1649) Nels. 46.
[7] *Montefiori* v. *Montefiori* (1762) 1 W.Bl. 363.
[8] (1649) Nels. 46. See also *Dyer* v. *Dyer* (1682) 2 Ch.Cas. 108; *Hobbs* v. *Norton* (1682) 1 Vern. 136; *Hunsden* v. *Cheyney* (1690) 2 Vern. 150.
[9] Nels. 48.
[10] See Holdsworth, *op. cit.*, Vol. 9, p 161.

II—WHEN ESTOPPEL EXISTS

Leaving aside for the moment the *High Trees* cases, estoppel by representation arises on the same occasions in equity and at common law. Where a person, knowing all the relevant circumstances, makes a representation to another, and thereby induces him to act upon it to his detriment,[11] there is an estoppel.[12] The maker of the statement, at the very least, is not allowed to come into court, in proceedings between himself and the person to whom he made the statement, and deny the truth of what he himself has said. The same sense was differently expressed in the common law case of *Pickard* v. *Sears*,[13] where Lord Denman C.J., delivering the judgment of the court, said: "Where one by his words or conduct wilfully [14] causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time."

The representation, in order to operate by way of estoppel, must be unambiguous,[15] but need not be in any special form: it may be verbal, or consist of conduct other than the uttering of words, including mere silence if the occasion is such that there is a duty to speak. An example of a verbal representation is furnished by *Hunt* v. *Carew*,[16] and of estoppel by conduct, by *Waldron* v. *Sloper*.[17] In *Hunsden* v. *Cheyney*,[18] a mother, who was the absolute owner of a term, was present at a treaty for her son's marriage, and she stood by silent when she heard her son declare that the term was to come to him at his mother's death. She was also a witness to the deed whereby the reversion of the term was settled on the issue of the marriage after the mother's death, though this was not a decisive point.[19] It was held that the mother was compellable in equity to make good the settlement, and to settle the reversion of the term accordingly after her death. That was a case of estoppel arising from silence where there was a duty to speak. "The duty to speak can only arise, in cases where there is no fiduciary relation between the parties, and where the contract [20] is not a contract

[11] See J. F. Wilson, "Recent Developments in Estoppel," 67 *Law Quarterly Review*, 330.

[12] See *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans* (1878) L.R. 6 H.L. 352, at p. 360, *per* Lord Selborne.

[13] (1837) 6 A. & E. 469, at p. 474.

[14] The word "wilfully" appears to be superfluous: see footnote (g) on p. 9 of Spencer Bower (*op. cit.*).

[15] *Low* v. *Bouverie* [1891] 3 Ch. 82.

[16] (1649) Nels. 46.

[17] (1852) 1 Drew. 193.

[18] (1690) 2 Vern. 150.

[19] A person witnessing a document would only be estopped by virtue of being a witness—at most—from denying the formality of its execution. In *Hunsden* v. *Cheyney*, the mother swore she did not know the true facts, but it is not clear from the report that she was believed.

[20] That is, if there is a contract at all. These rules are not confined to parties to a contract.

uberrimae fidei, if the circumstances are such that it would be inequitable to keep silence." [21] It is inequitable, presumably, where a reasonable observer would deduce from the silence that there was nothing to disclose.

Thus equity and the common law share the principles. Estoppel by representation arises in equity upon the same criteria as those applied by the common law. But there the similarity ends. True, estoppel is a rule of evidence in both equity and common law cases, but only in equity is it anything more besides.

III—Estoppel as a Cause of Action

It has been said [22] that there is an estoppel only where it proves an existing claim or defence. Estoppel is commonly taken to signify prevention of denial. Where a statement gives rise to an estoppel, the maker of the statement must "make his representation good," *i.e.*, the parties must be dealt with on the footing that the statement is true. But this pretence does not make it true, and it may be necessary to do something further in order to bring that about. And there estoppel may become a cause of action, which is a purely equitable notion.

Now, it has been said so often, and by so many, that estoppel is a rule of evidence, and not a cause of action, that there is a danger of this being believed as a matter of course, and of any statement to the contrary being dismissed as heresy. Admittedly, strong substantiation is required for any declaration that a long accepted proposition is untrue, and it is only a beginning to record that equitable estoppel was referred to, in contradistinction to common law estoppel, as being a cause of action, in *Williams* v. *Pinckney*.[23] There, Vaughan Williams L.J. said: "The common law doctrine of estoppel is of a very personal nature, and only exists between parties to the transaction. It is part of the law of evidence, and is not the same as the equitable doctrine. You cannot found an action on it as you can in equity."

A good illustration of estoppel operating as a cause of action is provided by *Hunt* v. *Carew* [24]: in that case there was clearly no cause of action against the son apart from the estoppel. There was fraud here, and in *Evans* v. *Bicknell*,[25] again, there are dicta to the effect that estoppel founded on fraud is a cause of action. There was no cause of action against the trustee in that case apart from the estoppel, this being a case in Chancery, though there may have been an action at law grounded on *Pasley* v. *Freeman*.[26]

[21] Ashburner, *op. cit.*, p. 451.
[22] *e.g.*, in *Low* v. *Bouverie* [1891] 3 Ch. 82, at p. 112, *per* Kay L.J.
[23] (1897) 67 L.J.Ch. 84, at p 87.
[24] (1649) Nels. 46. See p. 326, *ante*.
[25] (1801) 6 Ves. 174.
[26] (1789) 3 T.R. 51. In *Evans* v. *Bicknell*, Lord Eldon gave it as his opinion that the claim in *Pasley* v. *Freeman* itself ought to have been brought as a case of equitable estoppel.

In *Dyer* v. *Dyer*,[27] it was held that there would be no estoppel arising out of an innocent misrepresentation. In *Hobbs* v. *Norton*,[28] on the other hand, an innocent misrepresentation was held to estop, but the estoppel in that case did not operate as a cause of action. Eight years later, however, in *Hunsden* v. *Cheyney*,[29] an apparently grossly negligent misrepresentation was successfully used by way of estoppel to found a cause of action. A further case on these lines is *Burrowes* v. *Lock*,[30] where a trustee represented a share in a trust fund to be unincumbered, whereas in fact incumbrances upon it did exist. When he was sued, he pleaded that he had forgotten about the incumbrances when he made the representation. The plaintiff had taken an assignment of the share on the faith of the trustee's statement, and now recovered compensation from him in respect of the incumbrances. Ashburner [31] suggests that the cause of action was the refusal of the trustee to hand over the unincumbered share assigned, but this was not the ground upon which the case was decided, and it is submitted that the claim against the trustee arose out of the estoppel. Sir W. Grant M.R.[32] was content to let the estoppel arise out of gross negligence if fraud could not be proved. This is merely an extension to cases of gross negligence of the principle laid down with respect to fraud in *Arnot* v. *Biscoe* [33]: that where a person makes a representation enabling another to gain from a third person, the maker of the representation is liable to pay out of his own pocket all the loss of the third person.[34] The maker of the representation is estopped, and that creates a cause of action against him. The action is one to compel the making good of the representation, and if this cannot be literally done, compensation in money will be awarded instead.[35]

Further support for the view that equitable estoppel may operate as a cause of action is to be found in *Rawlins* v. *Wickham* [36] and *Slim* v. *Croucher*.[37] In the latter case, on the occasion of a loan upon the security of a lease, which the borrower represented himself

[27] (1682) 2 Ch.Cas. 108.
[28] (1682) 1 Vern. 136.
[29] (1690) 2 Vern. 150.
[30] (1805) 10 Ves. 470. And see *Pearson* v. *Morgan* (1788) 2 Bro C.C. 388. This is wrongly paged in the English Reports: it appears in Vol. 29, p. 214.
[31] *Op. cit.*, p. 447.
[32] 10 Ves. 475–476. And see *Pulsford* v. *Richards* (1853) 17 Beav. 87
[33] (1743) 1 Ves. Sen. 95.
[34] See *Evans* v. *Bicknell* (1801) 6 Ves. 174, at pp. 176–177. In *Hutton* v. *Rossiter* (1855) 7 De G.M. & G. 9, *Evans* v. *Bicknell* was followed in the Court of Appeal in Chancery, and Turner L.J. said (at pp. 22–23): "Observations have been made with reference to what passed in the House of Lords in the case of *Jordon* v. *Money* (5 H.L.C. 185). I have looked at the report of that case, and I find that it turned, as I supposed it did, upon the facts. The principle of law upon the subject does not seem to have been questioned."
[35] See 6 Ves. 180; *Grant* v. *Munt* (1815) G.Coop. 178.
[36] (1858) 3 De G. & J. 304.
[37] (1860) 1 De G F. & J 518. And see *Lake* v. *Brutton* (1856) 8 De G M. & G. 440; *Re Ward* (1862) 31 Beav. 1; *Stephens* v. *Venables* (*No.* 2) (1862) 31 Beav. 124; *Hill* v. *Lane* (1870) L.R. 11 Eq. 215.

as entitled to have granted to him for ninety-eight and a half years, the lender required a written intimation from the alleged lessor of his intention to grant the lease. The lessor, knowing of its purpose, signed the required intimation. The loan was made on the faith of it, and afterwards the lessor purported to grant a lease, which was then mortgaged by the borrower to the lender. It subsequently transpired that the lessor had some time before demised the same premises for the same term to the borrower, by whom that lease had since been assigned for value, and that therefore the lender had no interest in the land. It was held that the court had jurisdiction to direct repayment by the lessor to the lender of the sum which he had advanced, with interest, and that it was a proper case for the exercise of such jurisdiction, although the lessor was not shown to have been guilty of fraud or of having done more than forgotten the earlier lease when he signed the intimation and granted the second. The lessor's misrepresentation was negligent, and he was estopped by it. His statement that he intended to grant a lease included a statement of fact, namely, that he had power to grant a valid lease. He was bound to make good his statement that he had such power, but as this could not be literally done, he was ordered to pay compensation in money instead. There was no cause of action apart from the estoppel.

These cases, which involved a fraudulent or negligent, but never a duly careful innocent,[38] misrepresentation were so closely akin to the common law line of cases following in the wake of *Pasley* v. *Freeman*[39] that the principles tended to become confused. In consequence, the decisions in *Derry* v. *Peek*[40] and *Le Lievre* v. *Gould*[41] have been thought to apply to equitable estoppel as well as to the similar common law action. The result of these decisions is that the action in tort for deceit can be brought only where there is fraud and that there is no action for negligence (in the absence of some contractual or fiduciary duty) in respect of words uttered. Yet equitable estoppel applied to negligent misstatements; moreover, the equitable machinery for taking an account ensured greater accuracy in computing the amount due from the defendant than the common law method of leaving it to the jury to assess damages.[42] *Derry* v. *Peek* was not fought on the basis of estoppel, but as a common law action for deceit, and any passages in the speeches referring to the equitable principles were obiter dicta. Lord Esher M.R. in *Tomlinson* v. *Balkis Consolidated Co.*,[43] says that *Derry* v. *Peek* "has nothing whatever to do with the

[38] *Meriwether* v. *Shaw* (1789) 2 Cox Eq Cas. 124.
[39] (1789) 3 T.R. 51.
[40] (1889) 14 App Cas. 337.
[41] [1893] 1 Q.B. 491
[42] *Cf.* S. Alward, "A New Phase of Equitable Estoppel," 18 *Harvard Law Review*, 118, at p. 118 He deals with *Ewing* v. *Dominion Bank*, 35 Can.Supr. Ct. 133, a doubtful case of estoppel.
[43] [1891] 2 Q.B. 614

doctrine of estoppel." It is therefore submitted that it is still possible today to obtain redress in respect of a negligent misrepresentation on the basis of equitable estoppel. Professor W. A. Seavey suggests [44] as much of America: "In most jurisdictions, unless one knows a statement to be false or was reckless in making it, there is no liability for causing merely economic loss even though the statement involved a misrepresentation of fact and was made with the intention that another rely upon it. It is in this area, however, that we find the chief application of the anomalous doctrine of estoppel, anomalous because of its sporadic operation. Where the doctrine applies, not only does one become responsible for innocent misrepresentation, but he may also become subject to liability for failing to use means at his disposal to undeceive another."

There is, however, a variation in the United States on this matter from jurisdiction to jurisdiction. Some authorities contrary to *Derry* v. *Peek* are given by J. Smith,[45] while the case of *Ultramares Corporation* v. *Touche*,[46] decided by Cardozo J., which is quoted from at length by Cohen L.J. (as he then was), in *Candler* v. *Crane, Christmas & Co.*,[47] clearly supports *Le Lievre* v. *Gould*. While one may sympathise with the able effort of Denning L.J. in *Candler* v. *Crane, Christmas & Co.* (at pp. 878–882), to base liability for negligent misstatement on *Donoghue* v. *Stevenson*,[48] it now seems unlikely that any tribunal in this country will be so persuaded. In the absence of legislation on the subject, hopes must be pinned on equitable estoppel: a person who makes a negligent misrepresentation to another with the intention that that other shall act upon it, and with the consequence that that other does act upon it to his detriment, is bound to make the representation good, or pay compensation if this cannot be done. If *Cann* v. *Willson* [49] is no longer good law, *Slim* v. *Croucher* [50] must come to the rescue. Not everyone will be agreed with W. R. Anson [51] in thinking "the common law, as it stands, to be a monument of practical common sense," and there are those who will prefer "to contemplate rules of law through a golden haze of equitable possibilities."

[44] "Reliance upon Gratuitous Promises or Other Conduct," 64 *Harvard Law Review*, 918, at p. 921.

[45] "Liability for Negligent Language," 14 *Harvard Law Review*, 184; *Selected Essays on the Law of Torts*, 325.

[46] (1931) 255 N.Y.Rep. 170.

[47] [1951] 2 K.B. 164.

[48] [1932] A C 562.

[49] (1888) 39 Ch.D. 39.

[50] (1860) 1 De G. F. & J. 518 *Cf. Elkington & Co.* v. *Hürter* [1892] 2 Ch 452, at p. 455, where Romer J. said: ". . . and since the case of *Low* v. *Bouverie* the plaintiffs could not base their claim in reliance upon the equity which was laid down in the case of *Slim* v. *Croucher*."

[51] "*Derry* v. *Peek* in the House of Lords," 6 L.Q R. 72, at p. 74.

IV—ESTOPPEL AND INTENTION

Settled law has it that in order to operate by way of estoppel, a representation must be of fact, meaning not of law nor of intention.[52] Apparently, a person is not estopped from denying the truth of his representation as to the state of the law.[53] But there are doubts and distinctions with regard to statements of intention. If a man makes a statement as to his intention, and all the other elements of estoppel are present, he will not be allowed to deny that his intention was what he stated it to be. But the House of Lords have decided that estoppel will not operate in such a way as to compel him to carry out his stated intention.[54] It is in this connection that the *High Trees* cases must be considered. According to Mr. Wilson,[55] the first case in which the *High Trees* principle (which he calls "quasi-estoppel") was applied is *Hughes* v. *Metropolitan Ry.*,[56] and this is also the earliest case cited on the matter by Lord Justice Denning in his latest article.[57] There are, however, two other lines of cases which are relevant, even if not directly on the point. These are: (1) Cases where a genuine estoppel has operated in the release of an obligation; and (2) cases where the equitable defence of laches has been successful.

(1) *Estoppel and the Release of Obligations*

The eighteenth and nineteenth century cases appear to turn on the question of whether there was a representation by the plaintiff that he was releasing the obligation (estoppel),[58] or a representation by the plaintiff that he had no intention of enforcing the obligation (no estoppel).[59] It is clear that a mere statement of intention not to enforce an obligation does not by estoppel prevent its subsequent enforcement, notwithstanding that the obligor was intended to and did act upon that statement and altered his legal position in consequence.[60] It is equally clear that, under these cases, a statement that an obligation is released, if the obligor is intended to and does act upon it to his detriment, estops the obligee from denying the fact of the release, notwithstanding that what the obligee did was insufficient to effect a release in law.[61] It is difficult to see how

[52] *Cf.* L. F. Everest and E. Strode, *Law of Estoppel*, pp. 836–841.
[53] *Rashdall* v. *Ford* (1866) L.R. 2 Eq. 750; *Robertson* v *Minister of Pensions* [1949] 1 K.B. 227; *Dean* v. *Bruce* [1951] 2 All E.R. 926.
[54] *Jorden* v. *Money* (1854) 5 H.L.C. 185.
[55] "Recent Developments in Estoppel," 67 L.Q.R. 380, at p. 384.
[56] (1877) 2 App.Cas. 439.
[57] "Recent Developments in the Doctrine of Consideration," 15 M.L.R. 1, at p. 4.
[58] *Wekett* v. *Raby* (1724) 2 Bro.P.C. 386; *Richards* v *Syms* (1740) 2 Eq.Ca.Ab. 617, pl. 2; *Flower* v. *Marlen* (1837) 2 My. & Cr. 459; *Major* v. *Major* (1852) 1 Drew. 165; *Yeomans* v. *Williams* (1865) L.R. 1 Eq. 184; *Re Applebee* [1891] 3 Ch. 422.
[59] *Byrn* v. *Godfrey* (1798) 4 Ves. 6; *Cross* v. *Sprigg* (1849) 6 Hare 552; *Peace* v *Hains* (1853) 11 Hare 151; *Jorden* v. *Money* (1854) 5 H.L.C. 185; *Re Pink* [1912] 1 Ch. 498.
[60] *Jorden* v. *Money* (1854) 5 H.L.C. 185.
[61] *Major* v. *Major* (1852) 1 Drew. 165.

this proposition can have been affected by *Jorden* v. *Money*, where there was a mere statement of intention not to enforce. This distinction appears to be between a mere statement that the obligee will forbear to exercise what he continues to regard as a legal claim (which cannot estop him from denying that the claim has ceased to exist, as, by the very statement itself, the continued existence of the claim is assumed), and a statement by the obligee that he is renouncing his legal claim (a statement which is tantamount to "I have released my claim").

These cases of release by estoppel were apparently decided on the same principle as that which was applied in *Fenner* v. *Blake*,[62] which was treated by the Divisional Court as one of estoppel, and not as one of a representation of intention. Similarly, *Salisbury* v. *Gilmore* [63] proceeded on the basis that what was in form a representation of intention was in substance a statement of fact. Again, the principle is adequate to support *Foster* v. *Robinson*.[64] Lord Justice Denning, in his article in 15 *Modern Law Review*, deals extensively with the question whether the plaintiff's promise in that case was binding. The actual issue in the case could be decided independently of any decision on that point. The tenant's statement was in substance one that he occupied under a licence, and he was estopped from denying that because the plaintiff had allowed him to live rent free on the premises. Evershed M.R. said (at p. 155): "The fact that the doctrine of estoppel really forms the foundation in such a case as this of the alleged surrender by operation of law is, I think, clear from the judgment of Chitty J. in *Wallis* v. *Hands*." [65]

(2) *Estoppel and Laches*

Laches is a term which has caused much confusion on account of the obscurity of the relationship between lapse of time and acquiescence. *Laches* has, according to J. Brunyate,[66] a wide sense, "including all the rules under which lapse of time before a suit is brought can operate as a defence, but the word also has a narrow sense in which it is distinguished from acquiescence. Laches in the wide sense includes both laches in the narrow sense and acquiescence. Lapse of time can operate in two ways; it may be an element in a more general defence or it may be a defence in itself."

Only one case [67] appears to exist where lapse of time operates as a defence in itself. While the time has been lapsing, some event

[62] [1900] 1 Q.B. 426.
[63] [1942] 2 K.B. 88.
[64] [1951] 1 K.B. 149.
[65] [1893] 2 Ch. 75.
[66] *Limitation of Actions in Equity*, p. 188. *Cf.* H. G. Hanbury, *Modern Equity*, 5th ed., p. 55; H. T. Banning, *Law of the Limitation of Actions*, 3rd ed., p. 229.
[67] Apart from those to which a statutory period of limitation is applicable.

may have occurred, such as the death of witnesses, which makes it impossible or very difficult for the opponent to prove his case. Here the lapse of time may bar the claim; indeed, it is with the same circumstances in view that statutes of limitation are enacted, and the equitable rule is an analogous development. Hence, the period which must elapse in order to bar a claim in equity must be at least as long as the period of limitation which would have applied to the matter had the action been at common law.[68] All that this amounts to is equity following the law, with the one difference that the period is not fixed; only a minimum period is provided for.

Other examples of lapse of time operating as a defence in itself are given by Brunyate, but it is submitted that they are not true cases, being merely examples of lapse of time providing evidence of some other defence. Thus, he mentions the case of applications for speedy remedies: lapse of time will bar a claim for, *e.g.*, an interlocutory injunction.[69] Lapse of time in this case, however, is not a defence in itself, but is the strongest evidence that the matter is not one of urgency, and therefore that the case, irrespective of any lapse of time, is not one in which an interlocutory injunction could have been granted.

Acquiescence was regarded by Black J., as he then was, in *McCausland* v. *Young*,[70] as the acceptance by the plaintiff of the *status quo*, the defendant acting in reliance upon that acceptance and doing such consequential acts as to make it inequitable that he should be asked to undo it all in order to satisfy the plaintiff's claim.[71] *McCausland* v. *Young* was taken[72] to the Court of Appeal of Northern Ireland, where it was heard by two judges, who did not agree on the point of acquiescence. As the case is something of a *cause célèbre*, it is worth while to examine the judgments in detail with regard to that matter.

Sir James Andrews, the late Lord Chief Justice of Northern Ireland, used these words (at pp. 88–89): "What, then, is the law of acquiescence and laches? Acquiescence may arise whilst an infringement of legal rights is actually taking place, or it may result from the failure to seek redress or remedy when a violation of his rights, unknown to a party at the time, is brought to his notice. It is acquiescence in this second sense which is relied upon in the present case—an element in laches operating by way of estoppel. The principle underlying the doctrine of laches, as I understand it, is that in a court of equity, assuming there to be no statutory bar, a person is bound to prosecute his claim with reasonable diligence and without undue delay. The mere assertion of a claim will not

[68] *Archbold* v. *Scully* (1861) 9 H L C. 360.
[69] *Clarke and Chapman* v. *Hart* (1858) 6 H.L.C 633
[70] [1948] N.Ir. 72, at pp. 100–112
[71] See also *Smith* v. *Clay* (1767) 3 Bro.C C. 639n; *Blake* v. *Gale* (1886) 32 Ch.D. 571, at p. 581; *Allcard* v. *Skinner* (1887) 36 Ch.D 145, at pp. 186–187; *Rochefoucald* v. *Boustead* [1897] 1 Ch. 196, at p. 211.
[72] [1949] N Ir. 49.

suffice. The special circumstances of each case must, of course, be considered, especially the plaintiff's acquiescence as a free agent after he has acquired knowledge of the facts and of his rights. A change in the position of the party alleging acquiescence as a consequence of the other party's conduct is always a most material and relevant circumstance." Babington L.J. (at pp. 106–107) drew the same distinction between acquiescence during and after an act. He reviewed the authorities, and then went on to say (at p. 108) that the answer to the plaintiff's claim to avoid a forfeiture clause in a resettlement "must be either that he has by his acts shown 'a fixed deliberate and unbiassed determination' to abide by it, or that he has so dealt with the property as to make it impossible for the court to grant him relief."

Perhaps, therefore, acquiescence in a *fait accompli* is based on estoppel. Certainly, before he is barred by acquiescence, a plaintiff must know all the facts.[73] Again, it would seem that there is a distinction between conduct amounting to a representation that the claim is abandoned (acquiescence),[74] and a mere statement of intention not to sue (no acquiescence).[75] But evidently it is not essential to the defence of acquiescence that the person setting it up should have acted on it to his detriment; also, it appears that the longer the lapse of time since the acquiescence began, the better the chance the defence has of succeeding. And it is said that the defence of acquiescence cannot be pleaded where a statutory period of limitation is applicable. In *McCausland* v. *Young* (*ante*), Andrews C.J.'s statement that "A change in the position of the party alleging acquiescence as a consequence of the other party's conduct is always a most material and relevant circumstance" implies that it is not an essential requirement. Similarly, in *Lindsay Petroleum Co.* v. *Hurd*,[76] Lord Selborne said: "Two circumstances always important in such cases are, the length of the delay and the nature of the acts done during the interval. . . ." It is submitted that the length of the delay is important only to the extent to which it helps to answer the question, "Has the plaintiff by his acts shown a fixed deliberate and unbiased determination to abide by the *status quo*?"

It is obvious that lapse of time as a defence in itself must be confined to those claims in equity which are not provided for by any statute of limitations. And herein, apparently, also lies a distinction between the defences of acquiescence and estoppel. Estoppel differs from acquiescence in requiring as an essential element that the person relying on it should have changed his position on the faith of the plaintiff's conduct, while in acquiescence

[73] *Life Association of Scotland* v. *Siddal* (1861) 3 De G F. & J. 58, at p 74.
[74] *McCausland* v *Young* [1949] N Ir 49, at p. 108, *per* Babington L.J.
[75] *De Bussche* v. *Alt* (1878) 8 Ch.D. 286, at p. 314, *per* Thesiger L.J.
[76] (1874) L.R. 5 P.C 221, at p. 240. And see *G.W.R. Co.* v. *Oxford, Worcester and Wolverhampton Ry.* (1858) 3 De G.M & G. 341.

this is but one factor to be taken into account. Estoppel is a defence to any legal or equitable claim, while acquiescence in this sense is confined to equitable claims not covered by a statutory period of limitation.

There is a sense in which the term *acquiescence* is used to denote a defence to a claim at law, as well as to one in equity, but it is submitted that that is an example of estoppel properly so called. This meaning of acquiescence was considered by Fry J. in *Willmott* v. *Barber*,[17] where he said: "It has been said that the acquiescence which will deprive a man of his legal rights must amount to fraud, and in my view that is an abbreviated statement of a very true proposition. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. What, then, are the elements or requisites necessary to constitute fraud of that description? In the first place the plaintiff [seeking to rely on the acquiescence] must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraud of such a nature as will entitle the court to restrain the possessor of the legal right from exercising it, but, in my judgment, nothing short of this will do."

The High Trees Cases

Lord Justice Denning has in more than one place[18] stated the principle of these cases to be that a promise is binding [at least for the purpose of being set up as a defence] if deliberately made, intended to be binding, intended to be acted upon, and in fact acted on. This statement involves several points of interest: a promise is not a statement of fact; no detriment to the defendant is required; and no consideration is required to move from the promisee. The defence is said to derive from equity, but to apply to legal claims as well. It is not estoppel, contract, or

[17] (1880) 15 Ch.D. 96, at pp. 105–106. And see *Morrell* v. *Studd and Millington* [1913] 2 Ch. 648.

[18] *e.g.*, in *Wallis* v. *Semark* [1951] 2 T L.R. 222 at p. 226

acquiescence. Mr. Wilson, in 67 *Law Quarterly Review*, refers to the principle as "quasi-estoppel," and says (at p. 888): "Quasi-estoppel is available when an unambiguous representation of intention is made, which is intended to be acted upon and is, in fact, acted upon by the party to whom it is made, with the result that on the faith of it he prejudices his position in relation to the representor." Mr. Wilson thus differs from Lord Justice Denning in importing from traditional estoppel the requirement of detriment to the person pleading "quasi-estoppel." It is difficult to reconcile either of these propositions with *Jorden* v. *Money*. Indeed, Lord Justice Denning recognises this, for he has said [79] in answer that the law has not been standing still since 1854.

In *Hughes* v. *Metropolitan Ry.*[80] Lord Cairns said: "It is the first principle upon which all courts of equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results—certain penalties or legal forfeiture—afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties." For the purposes of that case, the principle could be stated in more easily recognisable terms: a person will not be allowed to profit by his own fraud; and it would clearly be fraudulent for one party to a contract (in so many words or not) to give the other permission to commit a breach and then turn round and sue him for it. It is not that the whole transaction is fraudulent, but the conduct of the plaintiff becomes fraudulent when he attempts to go back on the position he himself has caused to exist.[81] No such consideration entered into *Jorden* v. *Money*.

Birmingham and District Land Co. v. *L. N. W. Ry.*[82] carries the principle two stages further. First, an assignee may not enforce an obligation of which the assignor has authorised a breach. Were it otherwise, the combined actions of assignor and assignee would be just as much a fraud on the other party. Secondly, a party to an obligation who authorises the other to commit a breach of it may enforce that obligation if he places the other party in the same position as he was before the breach was authorised. Naturally, if the position of the parties is so adjusted, no question arises of profiting from fraud.

[79] [1947] K.B. 184.
[80] (1877) 2 App.Cas. 439, at p. 448.
[81] *Cf. Harrison* v. *Gardner* (1817) 2 Madd. 198; *Bannister* v. *Bannister* [1948] 2 All E.R. 133; and the cases on secret trusts and the doctrine of part performance, among other such manifestations of the equitable attitude to turning a rightful transaction into a fraud.
[82] (1888) 40 Ch.D. 268.

Panoutsos v. *Raymond Hadley Corporation of New York*[83] differs from the other cases in that the breach was of a condition precedent and not of a promise, and was waived, not authorised. Viscount Reading C.J. said (at p. 477): "It is open to a party to a contract to waive a condition which is inserted for his benefit." He went on (at p. 478) to quote with approval a question put by Bowen L.J. in *Bentsen* v. *Taylor, Sons & Co.*[84]: " . . . did the defendants by their acts or conduct lead the plaintiff reasonably to suppose that they did not intend to treat the contract for the future as at an end, on account of the failure to perform the condition precedent . . . ?" The same rules apply to waiver by a landlord of forfeiture of a lease. "The two essentials for waiver are: (1) that the landlord should be aware of the commission of an act of forfeiture by the tenant, and (2) that he should do some positive act which is a recognition of the continuance of the tenancy."[85] This principle is much older than *Hughes* v. *Metropolitan Ry.*

Buttery v. *Pickard*[86] is admirably treated by Mr. Wilson in his article in 67 *Law Quarterly Review*, and the case appears as reported to be authority for nothing at all. It is now possible to pass in chronological order to *Central London Property Trust, Ltd.* v. *High Trees House, Ltd.*[87] In that case there was a parol agreement to reduce the rent due under a lease, there being no consideration to support the variation. Although the efficacy of this agreement was not in issue, Denning J., as he then was, held obiter that it was binding. This was expressly not on the basis of estoppel, but because (at p. 184) "a promise was made which was intended to create legal relations and which, to the knowledge of the person making the promise, was going to be acted on by the person to whom it was made, and which was in fact so acted on." Among the authorities said to be followed were *Fenner* v. *Blake*, *Buttery* v. *Pickard*, *Hughes* v. *Metropolitan Ry.*, *Birmingham and District Land Co.* v. *L. N. W. Ry.* and *Salisbury* v. *Gilmore*. A few observations must be made:—

(1) *Jorden* v. *Money* could be and was distinguished (at p. 184) "because there the promisor made it clear that she did not intend to be legally bound, whereas in the cases to which I refer the proper inference was that the promisor did intend to be bound." This, it is submitted, is to go back to the distinction drawn[88] in the

[83] [1917] 2 K.B. 473.
[84] [1893] 2 Q.B. 274, at p. 283.
[85] G. C. Cheshire, *Modern Law of Real Property*, 6th ed., p. 184. And see *Gibbon* v. *Payne* (1907) 23 T.L.R. 250.
[86] (1946) 62 T.L.R. 241.
[87] [1947] K.B. 130. And see R. E. Megarry's note in 63 L.Q.R. 278; G. C. Cheshire and C. H. S. Fifoot, "Central London Property Trust, Ltd v. High Trees House, Ltd.", 63 L.Q.R. 283; and further notes by Messrs. R. E. Megarry and J. H. C. Morris and another learned contributor, 64 L.Q.R. 28–33, 193–195.
[88] See p. 382, *ante*.

cases on estoppel and the release of obligations: if there was a representation by the plaintiff that he was releasing the obligation there is an estoppel, but if the representation was merely that he had no intention of enforcing the obligation no estoppel results. In the *High Trees Case* the fact that the release was only partial seems immaterial here.

(2) The fact that the release was but partial does, however, bring the case into collision with the rule in *Pinnel's Case*,[89] embodied in the decision of the House of Lords in *Foakes* v. *Beer*.[90] The distinction appears to be that same one between an intention not to enforce and intention to affect legal relations, *i.e.*, to effect an immediate partial release.

(3) The defendants in the *High Trees Case* had not acted to their detriment in reliance on the release. Mr. Wilson in 67 *Law Quarterly Review* tries hard to find a detriment, but Lord Justice Denning in 15 *Modern Law Review* accepts that there was none. Indeed, it does not appear that they acted in any way in which they were not already bound to act. That means that the case could not be one of estoppel properly so called. There was no question of it being a case of legal variation of the lease, for the agreement was neither under seal nor for consideration.[91] Nor could it be said that in seeking to disregard the agreement the landlords were guilty of fraud, for, in asking for the full rent, the landlords were putting the tenants back in the position they previously occupied, so bringing themselves within the conditions laid down for a successful plaintiff in *Birmingham and District Land Co.* v. *L. N. W. Ry.* And it was not a case of acquiescence. Furthermore, the fact that the defendants did not act on the agreement to their detriment means that the facts of the case do not support the learned judge's dictum (at p. 134). Thus, to sum up, *Central London Property Trust, Ltd.* v. *High Trees House, Ltd.*, so far as it was there decided that the agreement was binding, does not follow any of the authorities cited in the case. The dicta to that effect are either wrong, or foreshadow the creation of a new principle, that a promise intended to be binding is binding, at least where it is a promise to forgo a benefit under an existing obligation. It remains to be seen whether any of the subsequent cases support such a proposition.

It is difficult to see why *Robertson* v. *Minister of Pensions*[92] was regarded by Denning J., when he decided it, as a *High Trees* case, yet he adheres to that view in 15 *Modern Law Review*, and it is accepted by Mr. Wilson in 67 *Law Quarterly Review*. There was no question of release or variation of a consensual obligation

[89] (1602) 5 Rep. 117a.
[90] (1884) 9 App.Cas. 605.
[91] *Cf. Scott* v. *Midland G.W. Ry.* (1852) 8 I.C.L.R. 59, at p. 64.
[92] [1949] 1 K.B. 227.

between the parties; there was a representation of fact, intended to be acted upon and in fact acted upon by the person to whom it was made, to his detriment. It was apparently a good old-fashioned case of estoppel—estoppel even at common law, for there was a cause of action apart from the estoppel, which was used merely to prove an existing claim.

In *Mitas* v. *Hyams*,[93] there was an oral agreement to alter the dates on which rent was payable under a lease under seal. Although treated as a *High Trees* case, it appears to have been more akin to *Berry* v. *Berry*.[94] In return for his landlord's release from the obligation to pay rent on the dates specified in the lease, the tenant promised to pay rent on the usual quarter days: a variation for consideration. Indeed, this explanation makes it a great deal easier to understand why the variation was held to be effective only if evidenced in writing or supported by acts of part performance.

The last case it is proposed to examine in this context is *Wallis* v. *Semark*.[95] In that case a rent book stated that a tenancy was subject to "one month's notice each party." That term was subsequently altered by the landlord's duly authorised agent to "one month's notice from tenant, two years' notice from landlord." It was held that the tenant was entitled to two years' notice. Once again, this could not be a case of estoppel, as the tenant had not altered his legal position in reliance on the variation, and for the same reason it could not come within the principle of *Hughes* v. *Metropolitan Ry.* Again, there was no question of there being a contractual variation of the lease, nor was it a case of acquiescence. Denning L.J. (at p. 226) relied on his dictum in the *High Trees Case*, but referred to a promise "intended to be acted on and in fact acted on." It was not in fact a promise which altered the course of the tenant's actions, and one must say again that that part of the judgment is unsupported. Perhaps, then, this case can be regarded as some authority for the proposition that a promise intended to be binding is binding, at least where it is a promise to forgo a benefit under an existing obligation.

Summary of Submissions

I. While a statement by an obligee that he does not intend to enforce an obligation can never give rise to an estoppel, a representation that an obligation is there and then released, being a representation of fact, can operate by way of estoppel. It is uncertain whether this applies to a partial release. There is an estoppel only where there is a statement of fact, intended to be acted upon by the person to whom it is made, and in fact acted upon by that person to his detriment.

[93] [1951] 2 T.L.R. 1215
[94] [1929] 2 K.B. 816.
[95] [1951] 2 T.L.R. 222.

II. Distinct from release by estoppel are certain other types of release: (1) An act or declaration creating an immediate discharge which the debtor can plead at law as a release or as accord and satisfaction.[96] (2) A discharge, which, though not immediate and absolute, becomes perfect by a condition having, in the event, been performed.[97] (3) The case where the creditor intends to discharge the obligation at his death, and communicates that intention to those who would, under his own disposition, take or represent his interest upon his death, and relies upon their fulfilment of his intention.[98] (4) The case where the transaction supposed to create the debt or obligation is rather in the nature of an advancement by one *in loco parentis*, or is part of a family arrangement.[99]

III. The equitable defence of acquiescence, which applies only in the absence of a statute of limitations, consists of showing a fixed deliberate determination by the plaintiff to abide by the *status quo*, making it inequitable, in the circumstances of the case, for him to seek to alter it.

IV. There is a defence of acquiescence applicable to claims at law (and also to claims in equity). This can be set up by a defendant who, ignorant as to his legal rights, has been encouraged by the plaintiff, who was aware of his own legal rights, and of the defendant's error, to do some act. This is a manifestation of the general principle of estoppel.

V. If a party to an obligation expressly gives permission to the obligor to commit a breach of it, or by his conduct reasonably induces the obligor to believe that such permission has been granted, he cannot subsequently enforce that obligation (except to the extent to which his permission was not applicable) without first putting the obligor in the position he occupied before the granting of the permission.

VI. A party to an obligation may waive a breach of a condition (as opposed to a promise) inserted for his benefit.

VII. *Wallis* v. *Semark* and the dicta in *Central London Property Trust, Ltd.* v. *High Trees House, Ltd.*, can be supported only on the basis that a promise to forgo a benefit under an existing obligation, if intended to be binding, is binding, without further requirements (or some wider principle embracing this proposition). There appears to be no further authority for that, except, possibly, *Buttery* v. *Pickard*. Moreover, it is questionable whether such a principle is desirable. In the *High Trees Case*, by an accident of fortune, the original bargain turned out a temporary hardship for the tenants. This being insufficient to frustrate the obligation, the

[96] *Reeves* v. *Brymer* (1801) 6 Ves. 516.
[97] *Aston* v. *Pye* (1788) 5 Ves. 354.
[98] *Wekett* v. *Raby* (1724) 2 Bro.P.C. 386. This is the secret trusts principle: see *Byrn* v. *Godfrey* (1798) 4 Ves. 6, at p. 10, *per* Lord Loughborough.
[99] *Foster* v. *Dawber* (1851) 6 Ex. 839. Here, in other words, there never was an obligation. See also *Peace* v. *Hains* (1853) 11 Hare 151, at pp. 155–156, *per* Page Wood V.-C.

landlords were entitled to insist on its full performance. If, in kindness, they promised to be content with half the amount due under the original agreement, thereby making it a temporary hardship for themselves instead of their tenants, and they neither received anything in exchange nor prejudiced the position of the tenants, the effect of holding their promise binding would be either to convert into contract a bare promise to give, or to make every such statement unretractable, according as the case is regarded as one of assumpsit or estoppel. The doctrine of consideration has been subjected to much relevant criticism, but it can scarcely be suggested that the law should enforce bare proffers of kindly help in times of adversity. Were there such a principle, however, that a promise intended to be binding binds, then it is doubtful whether any valid distinction can be drawn between a promise to forgo a benefit due and other types of promise. *Combe* v. *Combe* [1] does not assist in this speculation, for it does not appear that the promise in that case was intended to be binding. Entirely different factors, however, enter into the matter in respect of ordinary commercial dealings. If such a principle does come to be developed in the future, it is suggested that it should apply only to ordinary commercial transactions and cases where the most convincing evidence of intention to be legally bound is adduced. The most convenient regulation of commercial relations is one of the chief aims of this branch of the law, and the golden haze of equitable possibilities through which rules of law may be contemplated must not be allowed to obscure this object by its density.

L. A. Sheridan.[2]

[1] [1951] 1 All E.R. 767. *Cf Perrott (J. F.) & Co., Ltd.* v. *Cohen* [1951] 1 K.B. 705, at pp. 709–711, *per* Denning L.J.

[2] Lecturer in Law at the Queen's University, Belfast.

STATUTES

The Income Tax Act, 1952

The new Income Tax Act represents the most substantial and, certainly to the lawyer and accountant, by far the most valuable work of consolidation undertaken in the post-war spring-cleaning of the Statute-book. It does not attempt to codify the law of income tax; one would like to think that that may be attempted one day, but clearly the time is not ripe while a Royal Commission is sitting to review the law. In the meantime, the Herculean labour undertaken by the draftsmen of this Act is an essential preliminary to codification and one which in itself will materially lighten the task of all those (including the Commission) who have to try to find a path through the existing labyrinth.

The new Act consolidates and repeals the Act of 1918 and the income tax provisions of some 50 subsequent statutes. Every effort has been made to leave the letter of the law exactly as it was, and not to correct ambiguities or anomalies or to make amendments in the light of judicial interpretation. On the other hand, all statutory amendments, express or implied, have been incorporated, the wording has sometimes been improved where this could be done without risking altering the legal effect, and the whole of the resulting material has been rearranged in a far more logical and convenient order than hitherto.

It is in the last respect that the changes are most significant and valuable. In the 1918 Act much important material was to be found, with difficulty, in the time-honoured Schedules A–E appended to the Act and in their special and general rules. These now disappear as such. The nomenclature of Schedules A–E is retained for assessment purposes (it could hardly have been abolished outright without changing the law) but the so-called Schedules cease to be Schedules in fact, and the general and special rules become sections of the Act grouped under the appropriate heads of assessment.

This major improvement in lay-out, coupled with the grouping of all relevant provisions in their appropriate context, has unquestionably produced immense improvements in intelligibility. The Act is an instructive illustration of how much can be achieved by way of consolidation and rearrangement without change of substance. Indeed, not only is it a triumph of drafting technique in itself, but also to some extent a retrospective justification of the past labours of the much-maligned draftsmen of Finance Acts. Stripped of cross-references and placed in the appropriate context, provisions which hitherto seemed incomprehensible or clumsy now appear almost as models of clarity and precision. This is not to

say that the task of the tax-adviser has become simple; apart from the voluminous case-law, the new Act has 582 sections and 25 Schedules. Still, it is less difficult than it was.

If only the Act can be constantly revised and not allowed to become overlaid by succeeding Finance Acts, we may claim to have taken a big step forward towards legislative slum clearance. Other slums remain of course. In the same neighbourhood there are the death duty provisions buried in annual legislation dating back to 1894 and earlier. In a different field there are the Rent Acts—but consolidation alone cannot do much with them, they demand a brand new structure not based on a standard rent dependent on the (probably unknown) position in 1914 or 1939. But it is reassuring to know that it has at last been actively recognised that the form of legislation is almost as important as its content and that clearing dead wood is vital to new growth, and that these essential tasks are in such skilled hands.

L. C. B. G.

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NOTES OF CASES

Criminal Attempts

Surprisingly few cases on attempts to commit a crime engage the attention of the Court of Criminal Appeal. If it be thought that this phenomenon is due to the certainty of the law, at least one of the recent cases on the subject, *R.* v. *Whybrow* (1951) 35 Cr.App.R. 141 and *R.* v. *Moran* [1952] 1 All E.R. 808, will help to dispel any such misconception. The true importance of these cases lies not so much in the guidance which the former contributes to the question of *mens rea* in attempts as in the attention which both cases draw to the comparatively undiscussed problem of what crimes is it impossible to attempt to commit. Discussion therefore may conveniently be divided into two questions.

1. *What is the mens rea required in criminal attempts?*

Normally this presents no difficulty in that the same *mens rea* is required for an attempt as for the complete offence. It is only where the law recognises the doctrine of constructive *mens rea* that the danger of confusion arises, as can be seen in *R.* v. *Whybrow*. In that case the trial judge had directed the jury that they must find the prisoner guilty of attempted murder if they were of the opinion that his intention was to cause the death of his wife or to inflict grievous bodily harm on her. As a direction in a case of murder this statement of the law met with the full approval of the Court of Criminal Appeal, but as a direction in a case of attempted murder it was wrong, for in such a case the intent becomes the principal ingredient of the crime and nothing short of an actual intent to kill must be proved.[1] In other words, the doctrine of constructive malice has no place in attempted murder.

Where criticism is voiced against the notion of constructive murder it is principally directed to cases of killing in the course of committing a felony of violence, but it should be pointed out that killing in pursuance of an intent to do grievous bodily harm is no less an instance of constructive murder. It may, of course, be argued that in every case where the accused forms an intent to do grievous bodily harm there exists sufficient proof of his realisation and

[1] Comparison may be made with *R.* v. *Cruse* (1838) 8 C. & P. 541 and *R.* v. *Bourdon* (1847) 2 Car. & Kir. 366. In *Cruse*, where the charge was one of inflicting an injury dangerous to life with intent to murder (under 1 Vict. c. 85, s. 2) Patteson J. said to the jury: "Before you can find the prisoner guilty of this felony you must be satisfied that when he inflicted this violence . . . he had in mind a positive intention of murdering that child. Even if he did it under circumstances which would have amounted to murder if death had ensued that will not be sufficient, unless he actually intended to commit murder." See too 1 Bishop, *Criminal Law*, 8th ed. (1892), §§ 730 and 736, citing several U.S. cases in which this principle was followed.

recklessness that death might result.[2] This principle was embodied in Avory J.'s direction to the jury in *R.* v. *Lumley* (1911) 22 Cox 635, where it would seem that the judge's intention was to equate the phrase "grievous bodily harm" with the words "any act known to be dangerous to life," introduced by Stephen J. in *R.* v. *Serné* (1887) 16 Cox 311 to alleviate the harshness of the old rule which declared every killing in the course of committing a felony to be murder. No cause for concern exists if that be the meaning of grievous bodily harm. However, in the recent murder case of *R.* v. *Bloom* (1952), The Times, February 7, Hallett J., in explaining the nature of grievous bodily harm to the jury, relied instead on the definition "any injury which seriously interferes with the health or comfort of the person injured,"[3] which is the test used when charges are brought under the Offences against the Person Act, 1861. In extending this definition into the field of constructive murder Hallett J. has initiated what, it is suggested, is a dangerous principle, for it requires little imagination to conceive of cases where the injury inflicted, although it seriously interferes with the victim's comfort, is neither dangerous to life nor indicative of the accused having foreseen the possibility of death.

2. *What crimes is it impossible to attempt to commit?*

Up until the end of the last century it was thought that no criminal liability attached to a person who attempted to do that which in fact it was physically impossible to perform. Then came the decisions in *R.* v. *Brown* (1890) 24 Q.B.D. 357, and *R.* v. *Ring* (1892) 17 Cox 491, which laid down the modern principle that impossibility in itself is no defence to a charge of attempted crime. What those cases did not decide or discuss was whether there exist certain crimes which the law regards as impossible to attempt under any circumstances. This question has now been brought to the fore by *R.* v. *Moran*, in which the Court of Criminal Appeal ruled that there is no such crime as an attempt to demand money with menaces within section 30 of the Larceny Act, 1916.[4] According to Lord

[2] See *Russell on Crime*, 10th ed., Vol 1, p. 548, n. 69a

[3] *Per* Willes, J., in *R.* v. *Ashman* (1858) 1 F. & F. 88, who also held that it is not necessary that grievous bodily harm should either be permanent or dangerous. *Cf. R.* v. *Thomas* [1949] 2 All E.R. 662, at p. 670 (charge of murder to which the accused pleaded *autrefois convict*) in which the trial judge, Devlin J., appears to have adopted the prosecution's interpretation of grievous bodily harm as signifying "at least terrible injury" to the victim.

[4] The only report of *R* v. *Moran* so far available is most unsatisfactory. Reference to the transcript of the judgment in the C.C.A. reveals several odd facts. (1) The trial judge, Croom-Johnson J., said in relation to the charge under s. 30: "The crime is constituted by the demand for the money with menaces and *without any reasonable cause.*" Of course, the defence of reasonable cause applies only to a charge under s. 29 (1) and has no application to a charge under s. 30 (2) The jury returned a verdict of attempted robbery, when the indictment contained no count for robbery. The C.C.A. thought that the learned judge probably had robbery in his mind when directing the jury. It seems more likely that he confused s 30 with both robbery and the offence under s. 29 (1). (3) Although the facts as stated appear to fulfil the requirements of

Goddard C.J., who delivered the unanimous judgment of the court: "A man may form the intention of demanding money by menaces and then not put his intention into practice. Then he would not be guilty of demanding. But the court cannot see how you are guilty of an attempt to demand: you either demand or you do not."

If this view is correct there can be no half-way house in the crime of demanding with menaces between preparation, which is never punishable, and the completed offence. What then is the position where a person suffering from an impediment of speech begins to threaten X with violence unless he hands over a sum of money but before he can communicate his demand X moves away undisturbed? Suppose again that two confederates A and B agree to hold up X and that A, relenting of their common purpose, puts his hand over B's mouth as B begins to speak. Yet another example might arise where a person decides to communicate his demands impersonally by means of a loudspeaker concealed in X's house, but due to some technical defect the loudspeaker fails to function. Is it to be said in each of the above examples that until the proposed demand is in fact communicated to the intended victim the accused's conduct is still in the stage of preparation, to which no guilt attaches?

The decision in *R.* v. *Moran* leads us to consider whether there are any other crimes which it is impossible to attempt to commit. There is a complete absence of authority on this question and a strange dearth of discussion even among the leading textbooks, not a word being said on the subject in either *Russell*, *Archbold* or *Kenny*. The only writer to advert to the problem is Sir Fitzjames Stephen who, in his *History of the Criminal Law* (Vol. 2, p. 227), suggests that "a man could hardly attempt to commit perjury or riot or libel or to offer bad money or to commit an assault, for an attempt to strike is an actual assault." To these crimes Stephen adds treason by imagining the King's death, explaining that an overt act done with intent to commit treason would in itself constitute treason. Beyond this tentative list there is no guide, but it will be noticed that common to all the crimes listed by Stephen is the implied suggestion that since in those cases the *actus reus* for the attempt must coincide with the *actus reus* for the complete offence, it becomes in law impossible to commit an attempt. This reasoning would not apply to manslaughter and yet, having regard to the

demanding with menaces, it is suggested that the conduct of the accused did not amount to a sufficient "menace" within the meaning of s. 30. Had the conviction been dismissed on this ground it would have been quite understandable. It is noticeable that the prosecutor's reaction to the accused's threat: "I want some money and if not you have had it," was to square up to him, whereupon the accused went away. There is at least strong evidence here that the threat was "not calculated to deprive any person of reasonably sound and ordinarily firm mind of the free and voluntary action of his mind" within the test laid down in *R.* v. *Boyle* [1914] 3 K.B. 339. *Cf. R.* v. *Walton* (1868) L. & C. 288, at p. 298, in which the effect on the mind of the prosecutor himself was held to be the governing test.

views expressed in *R.* v. *Whybrow* on the nature of *mens rea* in attempts, it may seriously be doubted whether there exists such a crime as attempted manslaughter.[5]

We have already seen that to sustain a charge of attempted murder there must be proof of actual malice, *i.e.*, a specific intent to kill; constructive malice, though sufficient for murder, cannot be invoked in cases of attempted murder. Involuntary manslaughter, on the other hand, is essentially a crime which does not require a specific intent and where the *mens rea* is entirely constructive. Thus, it may be committed where death results from the doing of an unlawful act which is likely to injure another person [see *R.* v. *Larkin* [1943] K.B. 174] or where the conduct of the accused amounts to a very high degree of negligence generally described as recklessness [see *R.* v. *Bateman* (1925) 19 Cr.App.R. 8 at p. 11; *Andrews* v. *D.P.P.* [1937] A.C. 576, at p. 583; and *cf. The People* v. *Dunleavy* [1948] Ir.R. 95]. The question of attempted manslaughter would arise directly in circumstances where the accused's conduct is such as to amount to recklessness of human life but where, fortuitously, no loss of life results. Take the following example. A motorist, showing complete disregard for the life of other users of the road, drives at 50 m.p.h. down a crowded thoroughfare and strikes a pedestrian outside the entrance to a hospital. The injury inflicted would normally have resulted in death through severe hæmorrhage, but by prompt medical attention the pedestrian survives. Had the pedestrian died the motorist would have been liable for manslaughter since he had the necessary *mens rea*—recklessness—for the completed crime. Where death does not result there is no change in the *mens rea*, only the *actus reus* is altered, and in the example above the accused's conduct cannot go any further, so that apparently all the ingredients of an attempted manslaughter are fulfilled. The fallacy of this reasoning is the acceptance of constructive *mens rea* as sufficient for a charge of attempt. In *R.* v. *Whybrow* the Court of Criminal Appeal unhesitatingly rejected constructive *mens rea* in a charge of attempted murder. Should the question ever come before the court it may confidently be predicted that a similar ruling would be given in relation to attempted manslaughter, thus acknowledging manslaughter to be a crime which it is impossible to attempt to commit.

J. LL. J. EDWARDS.

MURDER—PROOF OF CORPUS DELICTI

IN *R.* v. *Horry* [1952] N.Z.L.R. 111, an appeal under section 8 (*a*) of the Criminal Appeal Act, 1945, against the conviction of Cecil

[5] There is a brief discussion of the question by Sayre: "Criminal Attempts," (1928) 41 Harv.L.R. 821 at p. 842, n. 78.

Horry for the murder of Mary Eileen Turner was heard by the New Zealand Court of Appeal on October 1, 2 and 3, 1951. Judgment was delivered on December 10, 1951. The appeal is of unusual interest in that the jury found Horry guilty of murder although the body of his victim had not been found. The appellant appealed on the ground, inter alia, that the learned judge directed the jury erroneously in summing up, in that he declined to direct the jury that, where no body or part of a body has been found which is proved to be that of the person alleged to have been killed, an accused person should not be convicted of murder or manslaughter, unless there is evidence either of the killing or of the death of the person alleged to be killed.

The submission of the appellant's counsel may be summarised as follows:—

(a) That, in a trial for murder, it is essential to prove that the crime had been committed and the identity of the murderer.
(b) That there was no satisfactory proof that murder had been committed because
    (i) no body or part of a body had been produced;
    (ii) there was no direct evidence that the victim had been killed;
    (iii) there was no clear and unequivocal confession of the murder by the appellant.

Counsel submitted that the existing authorities demonstrated that where an accused had been convicted of murder without production of the body or part of the body of his victim there had been either direct evidence of the crime or a confession by the accused. In the present case he submitted that as the evidence that the accused had murdered Eileen Turner was wholly circumstantial (a view with which the court, at p. 116, agreed) there was not sufficient proof of death.

The judgment of the court, delivered by Gresson J., sets out the more important facts and circumstances brought out in evidence. It was proved that the appellant married Eileen Turner on Saturday, July 11, 1942. The day before the wedding she had drawn out over £800 from her savings bank and on the day of her wedding she received a cheque for £687 6s. 8d., being the proceeds from the sale of a house. On Sunday morning, July 12, at about 11 a.m. the married couple called on a friend and Eileen Turner was not seen again. On July 14, 1942, the appellant under an assumed name opened a bank account into which £80 in cash and the cheque for £687 6s. 8d. were paid. A fortnight later the account was closed. On June 26, 1943, during an interview with two police officers the appellant offered an explanation for the disappearance of Eileen Turner. He said that the marriage was arranged so that she might go off with another man and that for his co-operation he received £650. When questioned again by the police in June, 1951, in

answer to a question by his wife as to whether Eileen Turner had turned up he replied: "That's impossible; she couldn't have."

Gresson J. stated at p. 121:

> "The most material of the grounds upon which the appeal against conviction was based was that there was no sufficient evidence of the death of Eileen. It was not denied that, if the evidence could be regarded as sufficient to establish that she had been murdered, there was ample evidence that it had been done by the appellant; and it was conceded that the evidence could be used for the double purpose of proving both the factum of the murder and who was its author. But it was strenuously contended that the evidence was insufficient to establish the *corpus delicti* itself."

After examining the authorities he stated at p. 121:

> "In this case there is nothing in the shape of a confession, nor is there any sort of trace of a body. There does not appear to be any case in which, without any evidence of a body, or traces of a body, or violence used to a body, or of anything approximating to a confession, the factum of the murder has been held to have been sufficiently proved by circumstantial evidence. In the absence of any authority exactly in point, the approach must be to determine the governing principle and to apply it to the somewhat unusual facts of this case."

At p. 128 the learned judge pointed out that

> "In this case, there is neither the body nor traces of the body, nor anything in the form of a confession, but, in our opinion, that does not exhaust the possibilities. There may be other facts so incriminating and so incapable of any reasonable explanation as to be incompatible with any hypothesis other than murder. It is in accord both with principle and with authority that the fact of death should be provable by such circumstances as render it morally certain and leave no ground for reasonable doubt—that the circumstantial evidence should be so cogent and compelling as to convince a jury that upon no rational hypothesis other than murder can the facts be accounted for."

The learned judge at p. 124 drew attention to the "formidable array of circumstances leading irresistibly to [the] conclusion" that Eileen Turner was dead.

> "In our opinion, it was competent for the jury to infer the fact of death from the whole of the evidence as a matter of moral certainty leaving no ground for reasonable doubt."

At p. 125 he said:

> "A jury viewing the evidence as a whole was, in our opinion, entitled to regard the concurrence of so many separate facts and circumstances—themselves established beyond all doubt, and all pointing to the fact of death at or about July 18, 1942—as excluding any reasonable hypothesis other than her death, and having, therefore, sufficient probative force to

establish her death. No alternative reasonable explanation had been put forward.

"If the evidence is sufficient to establish Eileen's death, as we hold a jury could have regarded it to be, there was ample evidence pointing to appellant's having murdered her."

This highly interesting case establishes that in New Zealand an accused person may be convicted of murder although there is no proof of the *corpus delicti*, direct evidence of murder, or a confession, provided that the fact of death is proved by circumstantial evidence of such a nature that it is morally certain that death has occurred. This evidence must be "so cogent and compelling as to convince a jury that upon no rational hypothesis other than murder can the facts be accounted for." [1]

J. F. NORTHEY.

WRONGS AND REMEDIES IN ADMINISTRATIVE LAW

IN *R.* v. *Electricity Commissioners* [1924] 1 K.B. 171 at 205, Atkin L.J. said that certiorari and prohibition will issue wherever "any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority . . . ." This statement of the law, which has often been quoted with approval, begged the question what was meant by a "duty to act judicially." In some cases it was suggested that it meant only a duty to follow a procedure analogous to the judicial. If this view implied that certiorari would not issue to a body unless that body was under a duty to hear two sides to a controversy, it was irreconcilable with a number of cases, both ancient and modern, in which certiorari had issued to bodies that were under no such duty (*cf.* Note, 14 M.L.R. at 78). That the applicant for certiorari is not necessarily obliged to "find the *lis*" is confirmed by *R.* v. *Manchester Legal Aid Committee, ex p. Brand (R. A.) & Co.* [1952] 1 All E.R. 480. An area committee set up in pursuance of the Legal Aid Scheme, 1950, to administer the Legal Aid and Advice Act, 1949, had granted a legal aid certificate to a trustee in bankruptcy in connection with civil proceedings that had already been instituted by the bankrupt. The defendants in these proceedings applied for certiorari to quash the certificate on

[1] By s 2 (1) of the Capital Punishment Act, 1950, the Crimes Amendment Act, 1941, was amended by providing that everyone who commits murder shall upon conviction be sentenced to death. However, although capital punishment for murder was reintroduced in 1950, Horry was not sentenced to death. Section 2 (3) of the 1950 Act provided that the Act would not apply to offences committed before the passing of the Act.

[This case is in several respects similar to the English case of *R.* v. *Camb*, The Times, March 28, 1948; "The Trial of James Camb" (*Notable British Trials*, Vol. 71, 1949)), although in that case the evidence to establish the fact of the missing victim's death was even stronger. Camb was reprieved at the time when the death penalty had been temporarily suspended by executive action during the debates on the Criminal Justice Bill.—Ed.]

the ground that the committee, in granting the certificate, had erroneously had regard to the means of the bankrupt instead of to the means of the trustee. The committee contended (inter alia) that its proceedings were purely administrative and were therefore not subject to certiorari. The Divisional Court, in a reserved judgment delivered by Parker J., found in favour of the applicants and ordered the certificate to be quashed. The "duty to act judicially," it held, might arise "in widely different circumstances which it would be impossible, and, indeed, undesirable, to attempt to define exhaustively" (at 489). The duty might arise in the course of arriving at a decision based wholly or partly on grounds of "policy"; thus, a Minister's decision to confirm a clearance order is preceded by a consideration of proposals and objections, and this statutory procedure imposes on him the further common law duty of acting judicially. Even where an administrative body is not required to decide anything resembling a *lis*, it is under a duty to act judicially if, as in the present case, it has to decide the matter before it "solely on the facts of the particular case, solely on the evidence before [it] and apart from any extraneous considerations." The committee was not entitled to refuse a certificate because it thought that the designated fund was becoming depleted or that certain forms of action should be discouraged. On the other hand, an administrative body that "at no stage has before it any form of *lis* and throughout has to consider the question from the point of view of policy and expediency," is not under any duty to act judicially (and is presumably not amenable to certiorari even if it exceeds its authority).

The decision is to be welcomed: certainly it would be deplorable for a court to hold that an administrative body which has exceeded its lawful authority is immune from control by certiorari. There is also much to be said for a refusal to lay down a comprehensive definition of "judicial" duties; but the law has become so confused by some of the decisions in cases where the complaint was not one of simple excess of authority but of breach of the rules of natural justice that a more thorough appraisal would have been valuable. Possibly, however, a Divisional Court would have experienced considerable embarrassment in attempting to explain such decisions as *Nakkuda Ali* v. *Jayaratne* [1951] A.C. 66.

It is unfortunate that the court should have lent countenance to the view that the functions of a body which has no "*lis*" before it and which decides solely in accordance with its views of "policy" cannot possibly be characterised as judicial. Leaving aside the difficulty of distinguishing between a "policy decision" and the exercise of a "judicial discretion," surely there is no sound reason why an excess of jurisdiction in the one case should be exempt from the consequences that would ensue in the other? There have indeed been cases in which the courts have assumed, without argument, that certiorari will issue to authorities which, according to Parker J.'s test, are under no duty to act judicially: see *R.* v. *Minister of*

Health, ex p. Dore [1927] 1 K.B. 765; *R.* v. *Minister of Town and Country Planning* [1951] 1 K.B. 1. And (*pace* the *Stevenage Case*) it is possible to imagine circumstances in which the courts would have shown little hesitation in characterising the functions of the Minister under the New Towns Act as judicial.[1]

S. A. DE SMITH.

POLICY AND DISCRETION IN LICENSING CASES

ON an earlier page of this volume (p. 78) Mr. de Smith has noted with approval the reserved judgment of the Divisional Court in *R.* v. *Torquay Licensing JJ., ex parte Brockman* [1951] 2 K.B. 784. It will be recalled that the case revives the problem, much discussed in modern constitutional law, of how far persons entrusted with a discretion are entitled to lay down (or at least to announce that they have laid down) principles to direct them in the exercise of that discretion. The chairman of the licensing justices had stated at the adjourned annual general meeting that in future the circumstances would have to be very special before full licences would be granted to those who held restricted licences. An order of *mandamus* was refused on the ground that the justices had in truth determined the case on the merits, for they had genuinely considered whether facts existed which took the case out of the general rule which they had laid down for themselves. Lord Goddard C.J. summed up the position thus: "Justices cannot make a rule to be applied in every case without hearing it. They may lay down for themselves a general rule, but they are bound to consider whether it is applicable to any particular case." The earlier case of *R.* v. *Rotherham Licensing JJ.* [1939] 2 All E.R. 710 was distinguished on the ground that the justices there had failed to determine the case on the merits because they had followed a general rule which they had laid down for their own guidance without considering whether it was in the public interest that a licence should be granted.

Mr. de Smith says that "the law laid down in the *Torquay Case* is firmly rooted in sound sense" because nearly every bench of justices has some sort of policy on matters which come before them and it is desirable in the public interest that they should make it as widely known as possible, for then applicants to that particular bench would know what to expect. No doubt this is true enough, although it may be observed that persons holding administrative positions who enunciate for the public benefit rules of conduct which they are under no obligation to lay down but which they propose to follow have had levied against them the wounding imputation of

[1] That proceedings before an administrative body may be judicial for some purposes (including amenability to certiorari) but not for others is further emphasised by observations of Parker J. in *Hanily* v. *Minister of Local Government and Planning* [1952] 1 All E.R. 1298 at 1297.

indulging in " administrative quasi-legislation," but it is submitted that the assumption upon which it rests, that justices are entitled to adopt general rules for their guidance in cases where they have a discretion, is not supported by the reasoning to be found in cases of good authority in other branches of the law.

In *Hyman* v. *Rose* [1912] A.C. 628, the House of Lords had to consider the discretionary power granted by the Conveyancing Act, 1881 (now L.P.A., 1925, s. 146 (2)) to relieve a lessee against the forfeiture of his lease. In the Court of Appeal, Cozens-Hardy M.R. had formulated some rather elaborately worded principles for the exercise of this discretion, but Lord Loreburn L.C. said:

> " I do not doubt that the rules enunciated by the Master of the Rolls in the present case are useful maxims in general, and that in general they reflect the point of view from which judges would regard an application for relief. But I think it ought to be distinctly understood that there may be cases in which all or any of them may be disregarded. If it were otherwise the free discretion given by the statute would be fettered by limitations which have nowhere been enacted. It is one thing to decide what is the true meaning of the language contained in an Act of Parliament. It is quite a different thing to place conditions upon a free discretion entrusted by statute to the court where the conditions are not based upon statutory enactment at all. It is not safe, I think, to say that the court must, and will always insist upon certain things when the Act does not require them, and the facts of some unforeseen case may make the court wish it had kept a free hand."

It is true that this language does not positively exclude the doctrine which has found favour in the *Torquay Case* but it clearly indicates some of the dangers inherent in that decision. If Parliament has provided that a licence may be obtained if the justices in their discretion see fit to grant one it is hard to see why an applicant should have to undertake, in Lord Goddard's own words, " the very considerable onus " of persuading the justices to depart from some line of policy which they have laid down for themselves without authority from Parliament. The applicant in such a case may well complain that the justices (however excellent their motives) are administering some local self-imposed law and not the general law of the land. The fact that they have chosen to announce their practice publicly only serves to emphasise this fact and not to justify it.

The point was clearly made by the Court of Appeal in *Wickins* v. *Wickins* [1918] P. 265, which dealt with the discretionary power created by section 31 of the Matrimonial Causes Act, 1857 (now section 4 of the Act of 1950) to pronounce a decree of divorce despite conduct on the part of the petitioner which would normally be considered a bar to a decree.

> " (W)here Parliament has invested the court with a discretion which has to be exercised in an almost inexhaustible variety

> of difficult and delicate circumstances, and where Parliament has not thought fit to define or specify any cases or classes of cases fit for its application, this court ought not to limit or restrict that discretion by laying down rules within which alone the discretion is to be exercised, or to place greater fetters upon the jurisdiction of the Divorce Division than the legislature has thought fit to impose."

If it be said that these are not licensing cases the answer is that there is no good reason why the law which decides how far persons entrusted with a discretion may fetter themselves in the exercise of it should vary according to the subject-matter upon which the discretion operates. In any case, it would be surprising if the law permitted a wider latitude to magistrates than it is prepared to concede to a High Court judge.

It may be that the *Torquay Case* has really done little to alter the law, for it recognises that justices are still obliged to decide the case on the merits in the sense that they must consider whether the facts disclosed by the applicant justify the application of the rules they have laid down for their own guidance. But although the burden of proof was always on the applicant it seems hard to allow justices to increase that burden by setting up against him what is in effect a rebuttable presumption that the case should not be decided on its merits and thus requiring him to discharge what may be " a very considerable onus."

Finally, it may be remarked that the case is an interesting illustration of the well-known judicial dislike of exercising wide discretionary powers without any guidance from the books. As Professor Lawson has recently said, " They are less inclined to exercise discretionary powers than the public is to commit such powers to them " (*The Rational Strength of English Law*, p. 67).

R. F. V. HEUSTON.

THE EXTENT OF CROWN PRIVILEGE

IN 1940 the Board of Trade made an order vesting gold belonging to a Dutch banking company in the Custodian of Enemy Property. The Custodian sold gold and used the proceeds to buy Treasury bills at a discount, paying income tax on the profits. In 1950 the Custodian transferred the property to the Administrator of Hungarian Property. The Dutch banking company first obtained judgment for the property against the Administrator and in the present case—*Bank Voor Handel en Scheepvaart* v. *Slatford* [1952] 1 All E.R. 814—made an application by action against the Custodian to determine whether the sums to be paid over should not include the amount of income tax paid by the Custodian. The Bank claimed, in effect, that the Custodian partook of the immunity of the Crown from income tax and it is on this that the importance of the case arises.

Devlin J. held that the income tax should not have been deducted and, in determining the position of the Custodian *vis-à-vis* the Crown, made a close analysis of the idea of Crown service or status. The learning that has gathered around the concept of the Crown is so much a mixture of totem and taboo that it is refreshing to read a judgment which deals so expertly with realities. At the same time, it seems to me that the common law has developed, not by a rejection of inadequate terminology, but by extending its meaning and scope.

The judgment of Devlin J. falls into two parts. The first part dealt with the plaintiffs' contention that the Custodian was a Crown "servant or agent." The learned judge considered that this term was too imprecise to be of value and that it confused the issue by suggesting that the extent of Crown immunity could be determined by reference to the presence or absence of the "normal incidents of ordinary service." These incidents were, in his opinion, primarily obedience to orders, and less importantly (indeed, of no importance at all if this primary incident was absent), the method of appointment and pay and the measure of control exercised over the subordinate. Devlin J. pointed out, first, that Ministers do not in fact take orders from the King and are, moreover, invested with many statutory powers; secondly, that judges and magistrates are appointed by the Lord Chancellor and the servants of many public boards and corporations are appointed by Ministers and that the Speaker and all judicial officers are paid out of the Consolidated Fund; thirdly, that the considerable control exercised over the Custodian by the Board of Trade was nevertheless a control limited by the terms of the statute which established the relationship. The learned judge argued from these points that Ministers are not strictly servants or agents, that appointees of the great officers of State are not necessarily servants or agents of the Crown, that payment out of the Consolidated Fund is equally inconclusive and that close control by a Government Department tends, if that control is delimited by statute, to negative the relationship of master and servant because "the power to direct a servant how to perform his duties is normally at large." Devlin J. therefore rejected the value of the plaintiffs' contention that the Custodian was a "servant or agent of the Crown."

It is respectfully suggested that this approach to the problem is not altogether helpful. The learned judge assumes that the relationship of master and servant at common law is clearly fixed and is easily ascertainable by reference to certain "incidents of service," and he emphasises the test of "obedience to orders." Yet it is precisely on this point that the common law doctrine has vitally changed over a number of years. A servant was one who was "subject to the command of the master as to the manner in which he shall do his work" and an independent contractor was distinguishable by this test. "Obedience to orders" is a fish in the same

kettle. And both are now in the sink. The old common law doctrine has long been inapplicable to modern conditions (see *Cassidy* v. *Ministry of Health* [1951] 1 All E.R. 574, and the note by Professor Kahn-Freund in 14 Mod.L.R. 504). But the modification of the old doctrine has not been to abandon the term "servant or agent" but to enlarge its meaning. It is too late now to reverse that trend. If the term is rejected, what becomes of the Crown Proceedings Act, 1947? Or are we to keep one term for purposes of liability and find another for purposes of immunity?

In the second part of his judgment, Devlin J. held that the Custodian enjoyed the immunity of the Crown because he had "Crown status." This phrase the learned judge borrowed from the judgment of Scott L.J. in *London County Territorial and Auxiliary Forces Association* v. *Nichols* [1949] 1 K.B. 85. Without attempting to "explore the extremities of Crown status," Devlin J. found sufficient the fact that the Custodian had duties bringing him "within the sphere of two of the most ancient and peculiar prerogatives of the Crown—the power to make war, including the power to take for itself the property of an enemy found within the realm, and the power to make peace." Against this it was argued that the Custodian was a creature of Parliament established to hold the property *in medio*, keeping it out of the grasp of the Crown whose prerogative was expressly preserved by the statute. Devlin J. rejected this argument on three grounds. He said, first, that Parliament was defining and modernising the prerogative power though preserving the common law right for use in some quite exceptional case. Secondly, the learned judge said that the close control exercised by the Board of Trade "does not show service in the strict sense but it does show that the Custodian is intended to be an instrument of government" and that therefore Parliament did not intend the Custodian to act in opposition to the prerogative. Thirdly, Devlin J. did not find impressive the argument that the Crown could not take the Custodian's holdings for any purpose it wanted and as freely as its own property. He agreed that this limitation might make difficult the establishment of the relationship of master and servant but considered that the difficulty disappeared if the Custodian was regarded as an official with Crown status.

Does the use of the phrase "Crown status" help to solve the problem? Scott L.J. certainly does not appear to have thought he was inventing a new concept. His judgment was based on one of the oldest phrases. He said: "As regards status, we are of opinion that a Territorial Association is, like a Minister or organ of the Central Government, a direct emanation from the Crown" ([1949] 1 K.B. at 47). The use of "emanation" had been frowned on by the Privy Council in *International Ry.* v. *Niagara Parks Commission* [1941] A.C. 328, which had preferred the term "servant or agent." When Day J. spoke of "emanation" in *Gilbert* v. *Corporation of Trinity House* (1886) 17 Q.B.D. 795, all he seems to

have been saying was that if a body was exercising functions previously exercised by the Crown and now transferred, it would be able to claim Crown immunity. Both Scott L.J. in the *Nichols Case* and Devlin J. in the present case were able to find that the disputed body was exercising such prerogative functions. But what if the Crown prerogative had not been expressly preserved by the statute in the present case? Is not the use of "Crown status" in fact itself as regressive as the other phrases?

There seems to be a simpler solution. The Custodian is an official of the Board of Trade, a civil servant. He is appointed by the Board under a statute which empowers the Board to vest in him certain properties, to confer and impose on him certain rights, powers and liabilities and to exercise over his actions very great control. Cannot the question be: "Has Parliament authorised the appointment by the Board of Trade of a person enjoying such a degree of independence that he must be regarded as an institution separate from the Board *or* has Parliament merely institutionalised a part of the Board of Trade?" The answer to the question can be determined by having regard to the method of appointment and of pay, the nature of the duties, the amount of discretion and the degree of control. Basically, is the Custodian recognised as a part of the organisation known as the Board of Trade? If so, with the greatest respect to Devlin J., let us call him a servant or agent of the Crown and say that that sort of person now falls within the meaning of that term. The classicism of Humpty Dumpty could not be more apt: "The question is which is to be master—that's all."

J. A. G. GRIFFITH.

EXERCISE OF RULE MAKING POWER—EARLIEST DATE—REGISTERED DESIGNS ACT, 1949

IN the case of complicated statutes and rules made thereunder, the legislator frequently applies the technique of fixing a date when the Act shall come into operation and of exercising a rule making power conferred by the Act before that date. This technique is sanctioned by the Interpretation Act, 1889, s. 37, but only "so far as may be necessary or expedient for the purpose of bringing the Act into operation at the date of the commencement thereof."

In *Usher* v. *Barlow* (1952) 69 R.P.C. 27, it was argued that the rule making power under the Registered Designs Act, 1949, had been exercised prematurely in respect of a particular rule, and that accordingly this rule was *ultra vires* and void. The Court of Appeal held that the rule was covered by section 37 of the Interpretation Act and was valid, but the Master of the Rolls felt some difficulty in arriving at this conclusion.

The Registered Designs Act, 1949, enacted on December 16, 1949, provides in section 49 (2) that the Act should come into operation on January 1, 1950. Under section 1 (4) power is given to the Board of Trade to exclude from registration under the Act designs for certain articles primarily of a literary or artistic character. Under section 86 general rule making powers are given to the Board of Trade for regulating matters placed under the direction or control of the registrar or the Board. The powers under both these sections were exercised by the Board of Trade on December 16, 1949, to make the "Designs Rules, 1949," S.I. 1949, No. 2868, stated to come into effect on January 2, 1950. The rules deal generally with the business of the registrar, forms to be used, fees to be charged and a host of other procedural matters. Rule 26 recites the power conferred in section 1 (4) of the Act and provides that designs to be applied to certain works of sculpture, certain printed matter, medals and wall plaques shall be excluded from registration.

The plaintiff prior to January 1, 1950, had produced and published a wall plaque which had not been registered under the Registered Designs Act or the previous Designs Act. He contended to be entitled to copyright in the wall plaque under the Copyright Act, 1911, without registration. This contention was correct at law provided registration of the wall plaque was effectively precluded by Designs Rule 26. The defendant argued that the wall plaque could have been registered under the Designs Act because Rule 26 precluding its registration was *ultra vires* and void on the ground that it was made before the commencement of the Act, although it was not necessary and expedient to make it at that date for the purpose of bringing the Act into operation. The Attorney-General was heard as *amicus curiae* and reference was made to *R.* v. *Minister of Town and Country Planning, ex p. Montague Burton, Ltd.* (1950) 2 All E.R. 282. In that case, it had been decided that rules providing the machinery necessary for an Act to function as soon as it comes into operation are clearly within section 37 of the Interpretation Act. The majority of the Court of Appeal in *Usher* v. *Barlow* held that this reasoning applied to the present case and laid stress on the point that under the Interpretation Act the rule making power may be used before commencement of the Act not only as far as "necessary" but also as far as "expedient." The court found that it would be highly inconvenient if the making of the rule prescribing the designs to be excluded from registration under the Act had to await the commencement of the Act, as this would involve a period of confusion and uncertainty even to the point of bringing the machinery of registration to a standstill, so that the rule was properly made before the Act came into operation. The Master of the Rolls agreed with the result, but only because Rule 26 was part of a larger body of rules made under the general powers of section 86 of the Registered Designs Act which were clearly justifiable, as expedient or necessary, to give the new Act working machinery.

This being so, he did not think it right to pick out one rule because in isolation it might fail to satisfy the requirements of the Interpretation Act. In the circumstances, therefore, the Master of the Rolls held Rule 26 to have been validly made. He stated, however, that if the rule had stood by itself he would not have found it easy to persuade himself that in order to enable the Act effectively to operate it was necessary to make before its commencement a rule excluding wall plaques from registration under the Act.

Had the rule stood by itself the Master of the Rolls would accordingly have held it *ultra vires* and invalid because the power of making it had been exercised prematurely.

On the basis of the present wording of section 37 of the Interpretation Act, 1889, a reasoning similar to that of the Master of the Rolls in *Usher* v. *Barlow* might be applied in future to other rules made prior to the date of commencement of the Acts containing the respective rule making power. Pending a decision by the highest tribunal the validity of such rules may therefore be in doubt for considerable periods. In order to avoid such a situation, it may be desirable to amend the Interpretation Act, 1889, by removing all restrictions as to the earliest date for the exercise of the rule making power once a statute conferring the power has been enacted.

P. Meinhardt.

Contributory Negligence

The decision of the Court of Appeal in *Drinkwater* v. *Kimber* [1952] 1 All E.R. 701 raises some interesting points on the scope of the Law Reform (Contributory Negligence) Act, 1945. The female plaintiff was a passenger in a van driven by the male plaintiff, her husband, when they were involved in a cross-roads collision with a car driven by the defendant. The wife claimed damages for personal injuries against the defendant, who counterclaimed against the male plaintiff, alleging that the latter's negligence contributed to the accident.

The defendant was unable to invoke the machinery for contribution provided by section six of the Law Reform (Married Women and Tortfeasors) Act, 1935, as, by reason of his position as husband of the female plaintiff, the male plaintiff was not a person "who would, if sued, have been liable." The counterclaim was therefore phrased in the words of section 1 (1) of the Law Reform (Contributory Negligence) Act, 1945, the defendant alleging that any damages he might have to pay the wife were "damage suffered as the result partly of his own fault and partly of the fault" of the husband. This counterclaim was not, therefore, for contribution, but for damages for negligence.

At the trial of the action Devlin J. found that the defendant was two-thirds and the husband one-third to blame. The wife therefore

recovered in full against the defendant, her damages being assessed at £405. The defendant's counterclaim against the husband for one-third of this sum was dismissed. On appeal against the dismissal of the counterclaim, the decision of the learned trial judge was upheld.

The two main grounds of this decision were that the defendant had no cause of action against the husband and that he had not suffered "damage" within the meaning of the Act.

On the first point, counsel for the defendant accepted the proposition advanced by Singleton L.J. that section 1 of the Act "does not create a right of action; it removes an obstacle." He contended, however, that such an action for negligence had always existed, though prior to 1945 it was strangled at birth by the claimant's necessary allegation that he had himself been adjudged guilty of negligence. If one applies to these facts the classic definition of Lord Atkin in *Donoghue* v. *Stevenson* the formulation of the duty will run thus: "I must take reasonable care to avoid driving my car in such a way as to involve another person in a collision as a result of which I can reasonably foresee that he will be compelled to pay damages to a third party who I can reasonably foresee may be injured." It is submitted that the whole underlying assumption of the 1945 Act is that one must foresee that another person may be negligent. If the careless pedestrian who steps off the pavement had looked more carefully there would have been no accident, yet the equally negligent driver cannot maintain that he is under no duty at all to envisage acts of folly. His duty undeniably exists, though the extent of his liability may be reduced. Similarly the driver in the present case must foresee that he and another may together cause injury to his passenger, and he must foresee that by inexorable process of law that other may be held liable for the whole of the damage thus caused.

Morris L.J., who was the only member of the court to deal in any detail with this point, held that "the reason the defendant has been held liable to Mrs. Drinkwater is because he himself was negligent to her and caused her damage. He has not been held liable because Mr. Drinkwater was negligent towards her." And again, "That Mr. Drinkwater's negligence towards the defendant caused him to be negligent towards Mrs. Drinkwater was not alleged, and was not proved, and was not held. The defendant does not, therefore, establish any cause of action against Mr. Drinkwater." This reasoning is summarised on page 706 of the judgment, where Morris L.J. says that it is very doubtful whether the defendant suffered damage "as the result partly of his own fault, and partly of the fault of any other person." "The legal liability to Mrs. Drinkwater . . . flowed only from his own fault."

It is respectfully submitted that another view may be taken. The Act deals with a situation where two people contribute to cause damage. The situation which falls outside it may be expressed

thus: "The reason that the claimant suffered damage was because he and no one else was at fault." This is not true of the claimant in the present case. The reason that he suffered damage was because he was involved in a collision, and it is not true of that collision that "he and no one else was at fault." The Court of Appeal, it is submitted, was envisaging another formulation: "The only reason that he suffered damage was because he was at fault." In the normal case of the contributorily negligent pedestrian these formulations will appear to mean the same thing, but in the facts of the present case the latter cannot mean "he and no one else was at fault." It must mean "the only reason that he suffered damage was because he and another (the defendant to the counterclaim) were at fault." He is thus in the position of the contributorily negligent pedestrian whose accident, it may be abundantly clear, would not have happened but for the negligent acts of both himself and the driver. Yet this person is clearly within the Act, and it is suggested that the defendant in the present case is in a precisely similar position.

The authorities, it is submitted, lead to a similar conclusion. Wherever contributory negligence has not formed an absolute bar, the remedy has been granted. In *Mowbray* v. *Merryweather* [1895] 2 Q.B. 640, the defendants supplied to the plaintiffs a defective chain, which broke, injuring the plaintiffs' employee. The plaintiffs settled his claim, and sued the defendants for that sum, as damages for breach of contract. They succeeded, and it was not suggested that the compensation paid to the workman was due "solely" to the employers' breach of duty, and not to the suppliers' breach of contract. Where the Maritime Conventions Act, 1911, has lifted the bar, there is a right of action of the type claimed in the present case. The decision of the Court of Appeal in *The Cairnbahn* [1914] P. 25, though distinguished by the court in this case in the second limb of its decision, was not distinguished as regards the existence of a cause of action. In British Columbia, where contributory negligence legislation preceded contribution between tortfeasors, a similar result was reached.[1]

The second ground of the decision was that the payment of damages to another is not "damage" within the meaning of section 1 (1) of the Act. "'Damage' includes loss of life and personal injury"; this, in section 4, is the only definition given in the Act. The court held that "damage" in this Act does not include financial loss, distinguishing *The Cairnbahn*, where recovery in similar circumstances was allowed in Admiralty, on the grounds that the Maritime Conventions Act, 1911, uses the words "damage or loss."[2] It is

[1] Contributory Negligence Act, 1925, c. 8. And see *Price* v. *Fraser Valley Milk Producers Assn.* [1932] 2 W W R. 65.

[2] "Where, by the fault of two or more vessels, damage or loss is caused to one or more of those vessels, to their cargoes or freight, or to any property on board, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault."

submitted that the excerpts from the judgments quoted by Morris L.J. do not establish that the court in that case regarded "damage" as incapable of meaning loss, or that they relied solely on the presence of that word. The difficulty lay in the words "damage to one or more of those vessels," and the word "loss" was invoked to show that "vessel" meant "owners of the vessel" and that "damage" was not confined to the physical. The 1945 Act presents no such difficulty. The words "where any person suffers damage" must necessarily mean "financial loss" if it is not to be confined to personal injuries. The Court of Appeal in the present case confined "damage" to the results of physical injury and to loss arising from physical damage to property.

It is respectfully suggested that the wording of the Act does not indicate such an interpretation. The limited scope of the definition section is explained by the obvious desire of the draftsman to forestall the interpretation which the courts were inclined to put on the word "damage" in section seven of the Admiralty Court Act, 1861.[3]

If pure financial loss is to be excluded from the operation of the 1945 Act, certain unexpected results may follow. If an employer contributes to cause an accident in which his employee-passenger is injured, the employer can recover from the other driver nothing for loss of services, for his is pure financial loss, not arising out of any personal injury to him. Similarly, a wife whose driving contributes to kill her husband-passenger will presumably have no claim at all under the Fatal Accidents Acts for though there is, curiously, no authority, she must surely have been wholly barred prior to 1945. Hers is a claim for pure financial loss, and she is not assisted by section 1 (4) of the Act which concerns only the contributory negligence of the deceased. In the present case the male plaintiff's claim for his wife's medical expenses was settled out of court. Presumably his contributory negligence should have barred him completely from recovering this pure financial loss.

Two further matters influenced the decision of the court. Firstly, the court must record the total damages which would have been recoverable if the claimant had not been at fault (section 1 (2)). This sum, it was said, would have been nil. It is submitted that this sum should be the total damage recovered by the wife, for, if two actions had been brought, the court in the second action would be considering for the first time the allocation of responsibility, and it may record the notional sum of the damages paid. Secondly, it was pointed out that section 1 (8), in applying the provisions of section 6 of the Law Reform (Married Women and Tortfeasors) Act, 1935, to the new situation, retains the limitation contained in

[3] "The High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship."
See: *Smith* v. *Brown* (1871) L.R. 6 Q.B. 729, 732; *Seward* v. *The Vera Cruz* (1884) 10 App.Cas. 59.
Contrast: *The Theta* (1894) P. 280, 283, the only direct decision on the point.

that section, which cannot, therefore, have been inferentially abolished by section 1 (1) of the 1945 Act. Two comments may be made on this. Firstly, there will not always be a duty as between the tortfeasors so as to invoke section 1 (1) of the Act. For example, I cannot, as a motorist, foresee that a driver in another street and I will simultaneously crash through a house and injure the occupant. It is not unreasonable that I should be under a further liability when I owe a positive duty to another than when I do not do so. Secondly, the subsection envisages three parties who are negligent, whilst in the present case there are only two.

The result of this decision is that once again, in spite of the pious hopes of the Law Revision Committee on Contributory Negligence, I am subject to different legal liabilities when I am driving my motor car and when I am sailing my yacht. The opinion may be ventured that further litigation will be required before the problems raised by this decision are fully determined.[4]

RAYMOND KIDWELL.

COVENANTS IN RESTRAINT OF TRADE AND THE HEALTH SERVICE

SOME interesting considerations concerning the principles underlying the validity of covenants in restraint of trade arise from the recent decision of the Court of Appeal in *Whitehill* v. *Bradford* [1952] 1 T.L.R. 66. The facts of the case were briefly as follows:—

In 1945 four doctors entered into a partnership agreement, the effect of one clause of which was to prohibit a retiring partner from practising as a general practitioner for 21 years within a radius of 10 miles of the partnership surgery. The partners subsequently became listed as general medical practitioners under the National Health Service Act, 1946, by section 35 of which it became an offence, punishable by fine, for a "listed" practitioner to sell the goodwill of his practice. On the retirement of one of the partners, the court held (1) that the covenant did not impose an unreasonably wide restriction; and (2) that the National Health Service Act, 1946, did not destroy the goodwill, so that there remained after 1946 a proper subject-matter for protection.

The following points seem to call for comment:—

(1) *The Question of Reasonableness*

It is well settled that a restrictive covenant is only enforceable if it is (a) reasonable in the interests of the parties; and (b) not against the public interest.[1] In the present case the argument

[4] Further discussion of the situation in *Drinkwater* v. *Kimber* may be found in "Joint Torts and Contributory Negligence" by Professor Glanville Williams, to which the present writer is greatly indebted.

[1] *Nordenfelt* v. *Maxim Nordenfelt Gun & Ammunition Co.* [1894] A.C. 535, 567, *per* Lord Macnaghten: a covenant is valid only "if the restriction is reasonable—reasonable, that is, in the interests of the parties concerned *and* reasonable in the interests of the public."

was only concerned with the first requirement. Perhaps this was because of the view expressed by Evershed J. (as he then was) in *Routh* v. *Jones*[2] that "if the covenant in question is shown to conform to the proper interest of the covenantor and the covenantee . . . then the public interest would be equally served."[3] But this statement is contrary to high authority;[4] and in any case the validity of such general statements is notoriously ephemeral in this branch of the law. The law concerning restraint of trade has always been ready to adapt itself to changes in social conditions. It would seem that the introduction of the Health Scheme was, apart from any special statutory provision, an important social change which might be expected to have some effect on this branch of the law. It is therefore to be regretted that the defendant—who had the task of adducing facts and arguments showing that the restraint was contrary to the public interest[5]—did not press this point with more urgency. In particular, the fact that a partner who leaves the partnership may receive compensation out of public funds might leave scope for the argument that it is contrary to the public interest that the public should both pay such compensation and be to some extent deprived of the services of the recipient of the compensation. Also, in appropriate circumstances, it might now be argued that a covenant restraining a doctor from practising in a particular area would be contrary to the public interest if there is an acute shortage of "listed" practitioners in that area. Whether in any area there is such a shortage is, of course, a question of evidence, and as no such evidence was adduced this particular argument was not open in the present case. But it does not follow that this argument is never open to the covenantor in similar cases.

[2] [1947] 1 All E.R. 179.

[3] *Ibid.*, at p. 182.

[4] *e.g.*, *McElistrim's Case* [1919] A.C. 548, 562; *Att.-Gen. for Australia* v. *Adelaide Steamship Co.* [1918] A.C. 781, 796; *Morris* v. *Saxelby* [1916] A.C. 688, 700. But see *North-West Salt Co.* v. *Electrolic Alkali Co.* [1914] A.C. 461.

[5] It is generally said that the burden of proving that the covenant is reasonable in the interest of the parties lies on the covenantee and that the burden of proving that it is contrary to the public interest lies on the covenantor. But this is misleading because the question of reasonableness is one of law, and there can be no burden of *proving* an issue of law. The only correct statement of the principle in the reports which the writer has found is by Lord Parker of Waddington in *Morris* v. *Saxelby* [1916] 1 A.C. 688, 706: "As I read Lord Macnaghten's judgment [in the *Nordenfelt Case*] he was of the opinion that all restraints on trade are contrary to public policy and therefore void . . . except in such cases where there are special circumstances to justify them. The onus of proving such special circumstances must, of course, rest on the party alleging them. When once they are proved it is a question of law for the decision of the judge whether they do or do not justify the restraint. *There is no question of onus either way.*" It is interesting to note that when Younger L.J. quotes this passage in *Attwood* v. *Lamont* [1920] 3 K.B. 571, 588, he omits the last two sentences, thereby materially altering the sense of the passage. If the question is one of law, the practical effect is that a finding that the covenant is not in the public interest may be based on argument as well as on evidence.

(2) *The Effect of the National Health Service Acts*

The part of the decision in *Whitehill* v. *Bradford* can be explained on a very narrow ground. The provisions of section 85 of the National Health Service Act, 1946, have been outlined above. By section 1 (8) of the National Health Service (Amendment) Act, 1949, section 85 of the 1946 Act "shall not affect . . . the exercise or performance under any partnership agreement to which this section applies[*] of any right or obligation of a partner to sell to, or purchase from another partner any share in the goodwill of the partnership practice, but any such agreement shall have effect subject to the following provisions of this section." By section 1 (5) of the same Act, where any partnership agreement to which this section applies confers an option on a "listed" partner to purchase the share of a "listed" partner and that option has been exercised "that share shall be transferred at the time and on the terms (except as to the payment of the purchase price) provided in the agreement. . . ." Such an option was contained in the present agreement and was exercised on the retirement of the defendant from the partnership. The terms of the option were therefore saved by section 1 (5) except that the retiring partner did not receive payment from the continuing partners but received instead compensation determined in accordance with regulations made pursuant to the Acts. If it be argued that section 1 (5) is confined to saving merely that part of the agreement relating to the conferment and exercise of the option, recourse can be had to the wider saving powers of section 1 (12) which provides that "where any agreement to which this section applies contains provisions which take effect on the purchase of any share or part of a share of the goodwill of the partnership practice, those provisions shall take effect in like manner on the transfer of that share or part in accordance with this section, notwithstanding that the transfer does not constitute a purchase." The combined effect of subsections (8), (5) and (12) therefore seems to have been to save the covenant in this case—*i.e.*, its validity fell to be determined solely by Common Law principles.

The wider question as to the effect of section 85 of the 1946 Act on a covenant in a partnership agreement which is not within section 1 of the 1949 Act was, however, also discussed, and is of more general interest. The defendant argued that, as the goodwill was no longer saleable, it could not be regarded as a "proprietary interest" which could validly be protected by a restrictive covenant. This argument was rejected by Sir Raymond Evershed M.R. "The goodwill remains one of the assets of the firm, but it is subject to the limitation that it cannot be sold to other people. So long as

[*] *i.e.*, "any partnership agreement in force on and immediately before the appointed day between medical practitioners undertaking to provide general medical services": s. 1 (1) of the 1949 Act. The present agreement fell within that definition.

the firm carries on, the goodwill necessarily remains one of its most valuable assets."[7] This part of the judgment merely illustrates a well-known concept of general jurisprudence—that the rights and powers of an owner over his property may be limited in various ways, and that one such possible limitation is a limitation on his powers of alienation. In general, property is property none the less though it is inalienable.

But in this context such inalienability is of particular importance. The court in the present case stressed the well-established distinction between covenants between master and servant, and those between the vendor and purchaser of a business, and stated the rule that, whereas an employer is not entitled to protect himself against the competition of his employee *per se*, the purchaser of a business can so protect himself against the competition of his vendor.[8] The court held that an agreement between partners was governed by the same considerations in this respect as a vendor-purchaser covenant.[9] The question then arises—what reasons are there for this distinction? There appear to be two—first, that in a vendor-purchaser agreement, the parties are at arm's length, whereas in a master and servant agreement the master has the monopoly of bargaining power; and secondly that "without a covenant on the part of the vendor against competition a purchaser cannot get what he is *contracting to buy*, nor can the vendor give what he is *contracting to sell*."[10] It is interesting to note that this second basis of the distinction is entirely cut away by section 85 of the 1946 Act. The principle that a man shall not derogate from his grant manifestly cannot take effect where the making of the grant is itself unlawful.

G. H. TREITEL.

IMPERFECT GIFT TO EXECUTRIX

As Evershed M.R. pointed out in *Re Freeland* [1952] Ch. 110 at 114, the contest in that case arose "from the amiability of the testatrix . . . towards the two ladies who are the parties to the suit, whom, by what is perhaps a strange irony, she appointed as her two executrices, and each of whom has laid claim, by gift or otherwise, to a specific chattel, namely, a Hillman motor-car." The testatrix had uttered certain words to the plaintiff which could be construed either as words of immediate gift of the car, or as a promise to give the car in the future, but had not delivered the

[7] [1952] 1 T.L.R., at p. 78.
[8] *Morris* v. *Saxelby* [1916] A.C. 688; *Attwood* v. *Lamont* [1920] 3 K.B. 571.
[9] *Empire Meat Co., Ltd.* v. *Patrick* [1939] 2 All E.R. 85, was distinguished on the ground that the covenant there was between master and servant.
[10] *Attwood* v. *Lamont* [1920] 3 K.B. 571, 590; *cf. Leather Cloth Co.* v. *Lorsont* (1869) L.R. 9 Eq. 345, 354; *Morris* v. *Saxelby* [1916] A.C. 688, 701.

car to the plaintiff or perfected the gift in any other way. Subsequently the testatrix wrote a letter to the plaintiff, in effect stating that she proposed to lend the car to the defendant for three or six months but explaining that she had no intention of going back on her word to the plaintiff. When the testatrix died, the plaintiff claimed the car under the doctrine of *Strong* v. *Bird* (1874) L.R. 18 Eq. 315, on the footing that the imperfect gift to her, coupled with an *animus donandi* in the testatrix continuing until her death, had been perfected by the plaintiff's appointment as executrix.

At first instance this contention succeeded, but the Court of Appeal reversed this decision; and it is not without interest that the letter which was almost entirely responsible for the plaintiff's success at first instance was largely responsible for her failure on the appeal. Viewed in one light, the letter was a request addressed to a donee, saying "The car is yours; do you mind if it is lent to the defendant?"; viewed in another light, the letter spoke merely in terms of moral obligation: "I am going to lend my car to the defendant but I am writing to you about it lest you might think I am going back on my promise to give it to you." The conclusion that the latter was the true construction of the letter was supported by the fact that in making the loan the testatrix throughout acted as if she were still the owner of the car. This destroyed the plaintiff's claim, for it was laid down in *Re Innes* [1910] 1 Ch. 188 (and has now been reaffirmed) that the doctrine of *Strong* v. *Bird*, *supra*, can be invoked only where there was a present intention of giving and not where there was a mere intention to make a future gift. A heavy burden of proof lies on any claimant against the estate of a deceased person, and the plaintiff could not satisfy the court that a testatrix, who had acted as owner in lending the car, had throughout had a continuing intention of immediate gift; indeed, if the plaintiff had asked the testatrix for the car, the answer would probably have been "You shall have it when the defendant has returned it." In the result, therefore, the plaintiff's claim failed.

Although unimportant, it is of interest to observe the grounds on which the defendant based her claim to the car, and what the actual result of the case was, apart from the bare fact that the appeal was allowed. Neither of these points appears in the report at [1952] Ch. 110, though both are stated in the report at [1952] 1 All E.R. 16, *sub nom. Jackson* v. *Rodger*. The defendant claimed (a) that she was entitled to the indefinite use of the car, as the loan by the testatrix had imposed no time limit, and alternatively (b) that the car belonged to the estate of the testatrix: [1952] 1 All E.R. 17. The result of the case was that the court made a declaration in the terms of alternative (b): [1952] 1 All E.R. 20.

R. E. Megarry.

THE RATE OF EXCHANGE: AN URGENT APPEAL FOR A MINOR REFORM OF THE LAW

THE decision of the Court of Appeal in *Cummings* v. *London Bullion Co., Ltd.* [1952] 1 All E.R. 888 relates to facts of the utmost simplicity. On August 15, 1949, when the pound was equal to $4.08, the defendants became liable to pay to the plaintiff, a resident of the United States of America, the sum of $8,200. The defendants could not pay without the permission of the Treasury, which they obtained on September 29, 1949. By that date the pound sterling was worth $2.80. The plaintiff claimed payment at the pre-devaluation rate and succeeded in the Court of Appeal.

Under the so-called breach-date rule which the Court of Appeal had adopted in *Vionnet et Cie* v. *Wills* [1940] 1 K.B. 72, conversion of the dollars into sterling had to take place at the rate of exchange prevailing at the date of breach. According to section 88 (1) of the Exchange Control Act, 1947, it was an implied condition of the contract "that, where by virtue of this Act the permission or consent of the Treasury is at the time of the contract required for the performance of any term thereof, that term shall not be performed except in so far as the consent or permission is given or not required." In these circumstances the question arose whether the breach occurred on August 15, 1949, when the defendants became liable to pay, but could not lawfully pay, or on September 29, 1949, when, as a result of the Treasury permission, payment could lawfully be made. The court answered in the latter sense. This was an almost inevitable solution, because it is obviously impossible to impute default to a debtor who by law is not allowed to perform his obligation. It is quite true that, if between August 15 and September 29, 1949, the plaintiff had instituted proceedings, Schedule IV of the Exchange Control Act would have enabled the defendants to pay the sterling amount of the debt, calculated at the pre-devaluation rate, into court. But this was treated as a special case and since the plaintiff had not instituted proceedings before the Treasury permission was available, the Court of Appeal with every justification refused to depart from the general principle.

The main reason which makes the decision noteworthy is that the Court of Appeal reconsidered the basic question whether English law has in fact adopted the breach-date rule in cases of this kind or whether, in so far as debts are concerned, the rate of exchange prevailing at the date of judgment should be treated as decisive. There cannot be any doubt that the latter view is preferable: see Mann, *The Legal Aspect of Money* (1938), pp. 310 *et seq.* Up to 1940 it seemed that, while in *The Volturno* [1921] 2 A.C. 545, the House of Lords had laid down the breach-date rule in regard to a claim for damages, the point was still open in so far as debts were concerned. The argument (for the details of which see Mann, *loc. cit.* pp. 292 *et seq.*) was based on another case which has made the

name of Cummings famous in the field of monetary law, *viz. Société des Hôtels Le Touquet Paris-Plage* v. *Cummings* [1922] 1 K.B. 451. There the Court of Appeal held that a debt expressed in French francs could be discharged by the payment of the agreed amount of French francs, notwithstanding the fact that proceedings had been instituted in England and that, as a result of the depreciation of the franc, the amount paid by the defendant was, in terms of sterling, much less than the amount of sterling claimed by the English writ and calculated on the footing of the breach-date rule. It seemed possible to suggest that it would be both unjust and illogical if the judgment of an English court would award to the plaintiff more than he was entitled to receive from a defendant paying voluntarily. Although Professor Kahn-Freund made a valiant attempt to keep the argument open (see Dicey (-Morris), *Conflict of Laws*, 6th ed., pp. 746 *et seq.*), the decision in *Vionnet's Case*, *ubi supra*, made it a very tenuous one. It is not surprising, though it is regrettable, that in the instant case the Court of Appeal has rejected it.

It is, however, submitted that the matter should not be treated as beyond repair. The results of the breach-date rule are too iniquitous to permit complacency.

In *Cummings* v. *London Bullion Co. Ltd.*, *ubi supra*, Denning L.J. said at p. 898:

> I take it to be clear law that, when a creditor comes to the courts to enforce a debt payable in a foreign currency, he is entitled to be put into as good a position as if the debtor had done his duty under the contract and paid the debt in the foreign currency without the intervention of the courts. To do this, judgment must be given for the creditor for the debt turned into sterling at the rate of exchange ruling at the date when it should have been paid.

Everybody will applaud the first sentence of this dictum. But it is submitted with the greatest respect that the second sentence cannot be supported. The breach-date rule does not achieve the object stated in the first sentence except where currencies remain stable. Where the value of the foreign currency changes prior to the date of breach, the principle of nominalism precludes any adjustment: see, *e.g.*, *Re Chesterman's Trusts* [1928] 2 Ch. 466. Where sterling depreciates (or the foreign currency appreciates) after the date of breach, conversion at the rate ruling at the date of breach imposes upon the creditor of a sum of foreign currency an unjustifiable loss: the creditor of $1,000 whose debt was due on September 17, 1949, receives after that date only £250, while he needs about £350 to obtain the amount he is entitled to. If sterling appreciates (or the foreign currency depreciates) after the date of breach, conversion at the rate prevailing at the date of breach confers upon the creditor a profit to which he is entitled only if the relevant legal system allows a claim to damages for delayed payment: if on

September 18, 1949, the value of sterling had been increased to $5 per pound, the creditor of $1,000 whose debt was due on September 17, receives about £250 or $1,250, while he ought to receive only £200.

The root of the trouble lies in the English rule of procedure which, for the purposes of a writ and judgment, requires conversion of the foreign currency into sterling. The problem would disappear if those in charge of the Rules of Supreme Court could be persuaded to make a short Rule to the effect that, where the claim is for a sum of foreign currency, the judgment (and, accordingly, the writ) should be for that sum or its sterling equivalent at the date of payment. It is probably no exaggeration to say that to-day the breach-date has been, or is in course of being, abandoned throughout the world, and it is high time that English law falls into line. It can be done almost by a stroke of the pen.

F. A. MANN.

STANDARD OF PROOF OF ADULTERY IN DIVORCE

IN the light of the attention that the question of the standard of proof in divorce cases has recently attracted, a note of the decision of Fell J. in *Price* v. *Price and Another* [1951] N.Z.L.R. 1097 may not be without interest. The hearing took place in October, 1951, and judgment was delivered on November 12, 1951. *Ginesi* v. *Ginesi* [1948] P. 179; [1948] 1 All E.R. 878, *Gower* v. *Gower* [1950] 1 All E.R. 804, and *Davis* v. *Davis* [1950] P. 125; [1950] 1 All E.R. 40 were considered by the learned judge, but apparently *Preston-Jones* v. *Preston-Jones* [1951] 1 All E.R. 124 was not cited by counsel.

The parties were married in 1942. In March 1950, after his wife had found letters from several women addressed to him, Price signed a confession of infidelity and promised not to offend again. However, he did not mend his ways and divorce proceedings were commenced after his wife and an inquiry agent had surprised the respondent and co-respondent [1] in a darkened house at about 11 p.m. Fell J. stated at page 1100 "The woman was dressed in slacks and a jumper, while Price was dressed in trousers and shirt without a jacket. The evidence was that neither their clothing nor the room was disarranged." The respondent denied adultery but "admitted holding the intervener's hand and kissing her when seated on the couch." The learned judge observed that the respondent was an unsatisfactory witness and his inability to remember matters was most unconvincing.

[1] In the law of New Zealand (Divorce and Matrimonial Causes Act, 1928, s 11 (1)), the term "co-respondent" is applied both to male and to female adulterers.

In reference to *Ginesi* v. *Ginesi* Fell J. stated (pp. 1101-2) that counsel in that case had

> "accepted the statement in *Churchman* v. *Churchman* ([1945] P. 44; [1945] 2 All E.R. 190) that the same strict proof is required in the case of a matrimonial offence as is required in connection with criminal offences so called (*ibid.*, 51; 195). It would seem that counsel sold the pass before the battle began, and he is not reported to have referred the court to *Mordaunt* v. *Moncrieffe* ((1874) L.R. 2 Sc. and Div. 374) or *Allen* v. *Allen and Bell* ([1894] P. 248), or to the sections in the Act corresponding with our section 6, which says that 'The court on being satisfied that the allegations . . . are true may make . . . a decree,' and section 17 (1) (*c*), which says that in every case in which relief is sought on the ground of adultery: 'If the court is satisfied on the evidence that the case for the petitioner has been proved . . . the court shall pronounce a decree of divorce.'"

Reference was also made to the decision of the High Court of Australia in *Wright* v. *Wright* (1948) 77 C.L.R. 191 in which its earlier decision in *Briginshaw* v. *Briginshaw* (1938) 60 C.L.R. 336 was examined. Fell J. stated (pp. 1102-3):

> "If *Wright* v. *Wright* ((1948) 77 C.L.R. 191) stood alone, I would be bound to follow the English Court of Appeal in *Ginesi* v. *Ginesi* ([1948] P. 179; [1948] 1 All E.R. 378) which has been followed in New Zealand in *Andrews* v. *Andrews* ([1949] N.Z.L.R. 178), but *Ginesi* v. *Ginesi* ([1948] P. 179; [1948] 1 All E.R. 378) has come under such heavy fire in *Davis* v. *Davis* ([1950] P. 125; [1950] 1 All E.R. 40) and *Gower* v. *Gower* ([1950] 1 All E.R. 804) that I think I may venture to decline with respect to follow it as being inconsistent with prior decisions of the Court of Appeal and the House of Lords in *Allen* v. *Allen and Bell* ([1894] P. 248) and *Mordaunt* v. *Moncrieffe* ((1874) L.R. 2 Sc. and Div. 374) and in conflict with sections 6 and 17 (1) (*c*) of the Divorce and Matrimonial Causes Act, 1928."

After considering *Davis* v. *Davis* and *Gower* v. *Gower* and in particular the judgments of Denning L.J. in those cases, Fell J. concluded (p. 1104):

> "In the present case, there is more than opportunity alone, and there is sufficient evidence to justify the inference that the opportunities would be used for misconduct; and, accordingly, exercising my judgment with caution and applying my knowledge of human nature to the circumstances of this case and this particular respondent, I conclude there is no other reasonable solution than that of guilt, and I hold that adultery has been proved to have taken place between the respondent and the intervener."

J. F. NORTHEY.

THE ANGLO-NORWEGIAN FISHERIES CASE, 1951
(I.C.J. Reports 1951, p. 116)

THE issue between the United Kingdom and Norway which was adjudicated upon by the International Court of Justice in December, 1951, may be stated simply. During the early years of the seventeenth century, when maritime princes favoured the *mare clausum* rather than the *mare liberum*, the King of Denmark and Norway protested against the presence of foreign fishermen in what were then regarded as the seas belonging to Norway. In the course of time such concepts of sovereignty over the seas outside the generally recognised limits of territorial waters became discounted. In 1906 British fishermen appeared in the vicinity of the fishing banks near the Norwegian coast, and in 1911 a British ship was seized for alleged violation of Norwegian waters. Diplomatic discussions ensued between Great Britain and Norway, but to no purpose. Finally in 1935 a Norwegian Decree was issued limiting Norwegian waters by reference to a four-mile belt seaward from straight base-lines drawn between 48 named points on Norwegian promontories, islands and drying rocks, closing a large area of water formerly regarded as high seas and important to the British fishing industry.

The United Kingdom applied to the World Court for a judgment declaring the principles of international law to be applied in defining the base-lines by reference to which Norway was entitled to delimit a closed fisheries zone, and to award damages for the wrongful seizure of British ships outside that area. Norway, on the other hand, asked the court for a declaration that the delimitation of the 1935 Decree was not contrary to international law. The court by ten votes to two, Judge Sir Arnold McNair and Judge Read of Canada dissenting, held that the system employed by the Norwegians was not contrary to international law, and by eight votes to four, Judge Hsu Mo of China and an unidentified judge having joined the dissidents, that the lines actually drawn were similarly compatible. Apparently, Judge Hackworth of the United States was not convinced of the Decree's compatibility with international law, for, while concurring in the operative part of the judgment, he "desires to emphasise that he does so for the reason that he considers that the Norwegian Government has proved the existence of an historic title to the disputed areas of water."

The problem of the limits of territorial waters is almost a perennial in international law, for although it was on the agenda of the 1930 Codification Conference it is one of the subjects considered suitable for codification by the International Law Commission. While, before 1951 at least, there was no doubt that States could not, at their own discretion, draw their maritime limits wheresoever they wished, the most that could be said from the point of view of international law was that States were entitled

to a maritime belt as least three miles wide which, so it was generally believed, should be measured seaward from low water mark more or less following the sinuosities of the coast. There were some States that refused to recognise the three-mile limit, and, for the purpose of this case at least, Great Britain recognised the Norwegian claim to a belt four miles wide.

The institution of territorial waters which is a manifestation of State jurisdiction is a derogation from one of the basic principles of customary international law, that of the freedom of the seas. It is essential, therefore, that some method of demarcation be applied which would assist in the adjustment of these conflicting claims. In practice most States, including the United Kingdom, have used the "arcs of circles" principle—which should be compared with what Professor H. A. Smith in his *Law and Custom of the Sea* calls the "double-radius rule." This is the counterpart of the method employed at sea in ascertaining a ship's distance from the coast to determine whether she is outside territorial waters or not. The court said that this principle only dated from 1930 when it was introduced by the United States. In fact, as a method of measurement, although perhaps not under that name, it has been used so long that Judge Read described it as the traditional method for at least a century-and-a-half, although he agreed that it was not a rule of customary law. Another method sometimes applied, particularly in connection with a highly indented coast, is that of the straight base-lines drawn between named points on the land territory. Apart from Norway, Iceland and Ecuador—both of whose assertions are contested—and Sweden use this method (see Johnson, "The Anglo-Norwegian Fisheries Case" (1952) *International and Comparative Law Quarterly*, p. 145, at p. 159, n. 25).

The United Kingdom did not oppose Norway's use of straight base-lines in all circumstances. She agreed that they were valid for denoting the closing lines of bays—"a bay in international law is a well-marked indentation, whose penetration inland is in such proportion to the width of its mouth as to constitute the indentation more than a mere curvature of the coast"—and of all fjords and sunds, to which it was recognised that Norway had an historical title. The contention was that at some points on the coast, which could not be regarded as bays, straight base-lines were completely improper.

As evidence of its claim Norway cited a number of Decrees going back to 1812. This was to the effect that "in all cases when there is a question of determining the limit of our territorial sovereignty at sea, that limit shall be reckoned at the distance of one ordinary sea league from the island or islet farthest from the mainland, not covered by the sea"—which came to mean in Norwegian practice not "continuously" covered by the sea. This was followed by similar Decrees in 1869—which France contested—

and 1889, but all these related to an area south of that in dispute and appear to have been intended as internal administrative measures—in fact that of 1812 was not published until 1880. From the time that the dispute with the United Kingdom started in 1911, the latter protested at the various seizures and sought to ascertain exactly where the Norwegian lines ran, but it was not until the 1935 Decree that any demarcation was made. Nevertheless, the court had no difficulty in holding that Norway had over a long period virtually enjoyed sovereignty over the disputed areas, and that the title had been acquiesced in by foreign States. This Norwegian claim is undoubtedly an exception derogating from the general rule: the court pointed out that it was justified by the unique character of the Norwegian coast, while Judge McNair drew attention to the Hebrides coast and Judge Read to that of Canada; and by the economic condition of the inhabitants—the court was unconcerned with the possible economic ill-effects that would befall British fishermen excluded from their habitual fishing grounds.

Professor Lauterpacht has pointed out, in a critical analysis of the case which appeared in *The Times* (January 8, 1952), that "inasmuch as it may create, with some, the impression of a daring piece of judicial legislation in the sphere of the law of the sea and in disregard of the historic attitude of the main maritime Powers, it raises issues which transcend the economic importance of the problem before the court." It should not be forgotten that to establish a rule of law on geographical uniqueness and economic hardship appears to rely on special pleading and subjective legislation for hard cases. To substantiate it requires the clearest evidence of consistent practice and acquiescence. Nevertheless, as in the *Asylum Case*, while the dissenting judges examined in detail the historical background of the claim, the court satisfied itself with the barest evidence. The court merely referred to one early concession to fish in a named area, part of which was in fact outside the 1935 limits. In the view of the court "these ancient concessions tend to confirm the Norwegian Government's contention that the fisheries zone reserved before 1812 was in fact much more extensive than the one delimited in 1935. It is suggested that it included all fishing banks from which land was visible, the range of vision being . . . the principle of delimitation in force at that time. The court considers that, although it is not always clear to what specific areas they apply, the historical data produced in support of this contention by the Norwegian Government lend some weight to the idea of the survival of traditional rights reserved to the inhabitants of the Kingdom over fishing grounds included in the 1935 delimitation, particularly in the case of Lopphavet. Such rights, founded on the vital needs of the population and attested by very ancient and peaceful usage, may legitimately be taken into account in drawing a line which, moreover, appears to the court to have been

kept within the bounds of what is moderate and reasonable" (p. 142). Although the court may have been concerned with the moderation and reasonableness of the Norwegian claims, it had made clear in an earlier passage that it would not insist unduly on consistency or certainty: "Too much importance need not be attached to the few uncertainties, or contradictions, real or apparent, which the United Kingdom Government claims to have discovered in Norwegian practice. They may be easily understood in the light of the variety of the facts and conditions prevailing in the long period which has elapsed since 1812 . . ." (p. 188).

It is not only the court's treatment of the historical background that is open to criticism. In every respect the paucity of evidence on which the majority decision is based is striking. As Dr. Schwarzenberger has pointed out in his recent paper on "Trends in the Practice of the World Court" (4 *Current Legal Problems*, 1951, p. 1, at p. 32), "the authority of the World Court (must) rest on the persuasiveness of its judgments and opinions. There is only one way to achieve the optimum that, in this respect, can be attained: the fullest and most cogent reasoning. It is probably not accidental that the least convincing statements made by the International Court of Justice excel by a remarkable economy of argument."

These criticisms of the judgment should not be taken to imply that the court conferred complete freedom upon Norway in establishing her base-lines. The court established three considerations which should be applied. "Base-lines must not depart to any appreciable extent from the general direction of the coast"—Judge Hsu Mo maintained that the permitted deviation must not be unduly liberal, while the court took the line that a liberal interpretation was to be applied, thus including Svaerholthavet and Lopphavet, neither of which Judge Hsu Mo nor the dissidents regarded as bays nor consistent with the "general direction of the coast." Secondly, "the real question raised in the choice of base-lines is in effect whether certain sea areas lying within these lines are sufficiently closely linked to the land domain to be subject to the régime of internal waters," another principle which the court felt should be liberally interpreted in the case of Norway. Finally, due consideration should be taken "of certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage"—a subjective test which, if generally applied, could lead to the negation of most principles of law.

According to Art. 59 of the Statute of the World Court a decision is authoritative only on its own facts and for the parties to the particular issue. Strictly, it lacks all precedent value. It cannot be doubted, however, that, although it might be argued that the court was applying special rules to a special set of circumstances, other States will hasten—as Iceland has already done (*The Times*, May 5, 1952)—to apply similar base-lines to measure its own

territorial belt, for, as Sir Arnold McNair pointed out, it becomes somewhat hypothetical to conceive of any "principle or rule of law which allows a wider belt of territorial waters to a country possessing a mountainous coast, such as Norway, than it does to one possessing a flat coast, such as the Netherlands" (p. 171). Not only does the judgment not assist in finally delimiting territorial limits, but if generally applied it will make confusion more confounded and territorial waters will vary from coast to coast. The decision is in line with the modern tendency—somewhat strange in an age which expresses belief in international co-operation and inter-dependence—to whittle down the principle of the freedom of the seas in favour of coastal States, a principle which is already constantly asserted in connection with the continental shelf and rights to the resources of the sea, the seabed and its subsoil (see the writer's "The Continental Shelf" (1951) 4 *Current Legal Problems*, p. 54, at pp. 71 *et seq.*). If the matter is left to go uncontrolled the assertion in the Individual Opinion of Judge Alvarez, with all that it implies, may well become true: every State "is entitled, in accordance with the general principles of the law of nations now in existence, to determine not only the breadth of her territorial sea, but also the manner in which it is to be reckoned" (p. 158).

This trend towards subjectivity is not, unfortunately, confined to problems concerning territorial sovereignty. The decision lends further weight to Dr. Schwarzenberger's comment that "the synopsis of majority and dissenting opinions in any single case before the court provokes a . . . disturbing reflection. By the choice of the appropriate major premises and methods of treaty interpretation, every single case might have been decided in the opposite way" (*loc. cit.*, p. 81). Should this tendency become too marked, the court may well find itself the chief sufferer from its somewhat quixotic expositions of international law.

L. C. GREEN.

Erratum

In the note on "Common Mistake," pp. 229 *et seq.*, the reference at p. 229, line 12 from the bottom of the page should be to section 6, not to section 7, of the Sale of Goods Act. The words "to the knowledge of the seller" in lines 9 and 8 from the bottom should be replaced by "without the knowledge of the seller." We are obliged to Mr. A. M. Honoré, of Queen's College, Oxford, for drawing our attention to this regrettable error.

Editorial Committee.

REVIEWS

THE REFORM OF THE LAW. Edited by PROFESSOR GLANVILLE WILLIAMS. [London: Victor Gollancz, Ltd. 1951. viii and 216 pp. 18s.]

THIS collection of independently written chapters on Law Reform is edited and (one suspects) in part written by Professor Glanville Williams. Graced by an erudite and brilliant editor, it would be impossible for the work to be devoid either of value or of interest. It is disappointing that the selection of his collaborators was restricted to lawyers of one political colour, although this was inevitable since the work was prepared by the Haldane Society—in its erstwhile shape and before the Society of Labour Lawyers was established as a rival organisation. Nevertheless, although deprived of contributions from the "bluer" pens, there is a fine muster of names adjoining the title page, and the notification that portions have been contributed by Lord Chorley, the late Professor Harold Laski and Dr. Mannheim is itself enough to encourage high hopes of an exciting and provocative book—hopes which, alas, are by no means fully realised

The object of the book, in the words of its sponsors, is "a contribution towards the development of the law which may assist progressive opinion in considering and furthering practical legislation." This object is not, however, advanced by its failure to reveal for what type of reader it is intended. To a lay reader, portions of the book are far too technical since they presuppose a knowledge of the law to understand them. If the book is intended for lawyers, then many portions are insufficiently argued or reasoned so that the reader, not already convinced that a particular change or reform is necessary, is furnished with little or nothing to persuade him to a more "progressive" viewpoint.

But the primary fault of this book is that it is entirely lacking in shape. The method of synthesis employed in writing the book, by using a considerable number of authors of varying degrees of learning and distinction, could only achieve success if they had been required to work to a stringently imposed plan, and had been subject to strict editorial supervision in fulfilling that plan. It is abundantly clear that in fact only the loosest possible plan was devised, whereby each author was to deal on a particular subject with what either he or the editor conceived to be appropriate for law reform, and that no real thought was given to the precise extent of the legal topics which are appropriate for reform *through the intervention of lawyers*. In the result, the book is a hotchpotch of proposals relating to a diversified number of topics, many of which are entirely outside the scope of "The Reform of the Law" in so far as the reform of the law is a matter for lawyers. It is perfectly true that lawyers have as much right to express their opinion on topics relating to stage censorship; the freedom or control of aliens; the law relating to prostitution; cruelty to animals; and current morality in regard to divorce, as any other section of the community, but it should have been clear to those responsible that by embracing the whole sphere of social and political controversy, they were largely defeating the purpose of the book and exposing its contributors to a scrutiny of their qualifications on these particular topics which leaves some of them in a highly vulnerable condition.

The sponsors of the book will, no doubt, vigorously contend that it was not their intention to restrict themselves to purely technical matters, to which the unhesitating reply must then be given that it is impossible to deal with the subjects they have endeavoured to cover within the scope of a relatively short book, and that a work which had restricted itself to the type of legal

reform which is within the special knowledge of lawyers would have been infinitely better argued, infinitely more persuasive, and infinitely more valuable.

As a result of the effort to crowd such a variegated collection of topics into one work, each topic has necessarily been dealt with in a sketchy and inadequate fashion. In the majority of cases, the reformer contents himself with the dogmatic assertion that a particular rule or institution is wrong and should be changed. There is rarely a presentation of any argument to the contrary, and one is left with the entirely fallacious impression that each one of the proposals put forward is self-evident, and that there is nothing whatever to be said on the other side.

Illustrations abound of this summary, and in many cases unfair, treatment of existing institutions. The writers of the book, not unexpectedly, are in favour of a fusion of the two branches of the legal profession and a consequential abolition of the distinction between Leading and Junior Counsel. This matter has been the subject of considerable discussion over many years. The present reviewer, a wholehearted supporter of "fusion," cannot feel that the cause is given any powerful aid by its presentation here. To set out the proposal without any reference to the case which can be made against it on the score of maintaining the aloofness of the Bar and the high degree of specialisation which is achieved through the present division, serves little purpose save to provoke irritation.

Similarly, the arguments for the retention of Queen's Counsel are nowhere presented. All practitioners will be acquainted with the immense benefit of having a counsel engaged in the case who need not concern himself with the details of pleading, apart altogether from the attractive professional feature of allowing a man to graduate, when he attains a sufficient degree of eminence and experience, to a type of work which is free from the worry and irritation of Chamber Summonses, drafting, and the like. These arguments can almost certainly be offset by the serious detriment to the litigant in regard to expense and in other ways, but they should at least be presented.

Moreover, the authors, in their determination to be as thoroughgoing and revolutionary as possible, occasionally produce proposals which by now they may well wish to retract. Possibly, the most flagrant of these is the suggestion that the upper limit for a brief fee in a civil case should be thirty guineas. How anyone acquainted with the practice of the law could suggest that this sum could be a proper remuneration in a heavy action, which might involve weeks of preparatory work and the study of innumerable authorities, passes comprehension. Here again failure to state the other side of the case vitiates a very large part of the proposals put forward. The whole spirit of the book is one of quite ruthless iconoclasm and it is shot through and through with a determination to ensure that the baby, the bath and the bath water are all permanently jettisoned.

It may not be unprofitable to subject one of the better chapters in the book to a brief analysis. The law of contract and tort is dealt with in some sixteen pages. The first few pages are concerned with the proposals of the Law Revision Committee in relation to the doctrine of consideration, and set out in some detail matters about which there will be little general disagreement. The author then finds, no doubt, that his space is thereafter heavily curtailed, and proceeds to make a number of other recommendations. Accordingly we have one sentence, "The law relating to the contracts of infants (minors) is in a most confused and unsatisfactory state"; it would be interesting to know what the author objects to in regard to the law relating to minors but, since he declines to tell us, we must forever remain in a state of speculation. In the respectful view of the present reviewer the law relating to infants' contracts could be a great deal worse both in principle and in application. If a committee were to sit down for a very considerable period of time to devise a new set of rules *ab initio*, it is unlikely that they would

reach any very different conclusions than that a minor should be liable under contracts for "necessaries"; that otherwise, as a general principle, the contracts of a minor should be unenforceable, unless ratified after attaining full age; that certain contracts should be void; and that contracts which are demonstrably for the benefit of the infant should be enforceable.

There is a similar assertion that the law relating to wagers is unsatisfactory. On this topic there is profound agreement, but nothing whatever is stated as to what the law relating to wagers is or how it should be reformed, nor is any indication given of the extraordinary complexity and difficulty of the subject and the terrifying cleavage of public opinion in regard to all matters of betting.

Later in the same chapter, there are suggestions for reforming the law relating to conditions contained or referred to in a ticket, but so far as the present reviewer can see, the proposed reform corresponds very closely to the existing law.

Again, we are told, "Our law of quasi contract lags far behind the systems that derive from Roman law." We are not, however, told that the Roman law of quasi contract fits in with the structure of the Roman law of contract and will not fit in with the common law structure. In some years of experience, the present reviewer has never felt the need for the introduction into English law of the well-meaning busybody designated by Roman law as the "negotiorum gestor," and the suggestion that such an institution is necessary lacks any illustration to support it. It is at least open to argument that the unsolicited intervention by one person into the affairs of another should be at his own risk and cost, unless his actions are adopted by the intended beneficiary. Similarly, there is a bald assertion that "a remedy should be given for money paid under a mistake of law," without any reference whatever to the value of the existing rule.

One can multiply these instances of unsupported statements without argument or reasoning, far beyond the space that is extended to this review. We are asked to abolish the action for breach of promise of marriage, although it must be clear even to those who have conscientious objections to this type of action (principally males) that there are cases where the gravest possible injustice would be perpetrated if some remedy did not exist, and no reference is made to the special rule of evidence with regard to corroboration, which is designed to avoid the exploitation of this type of action for blackmail purposes.

We are urged to introduce a fresh tort recognising a right of privacy, which is an odd recommendation when most practitioners in the cognate field of defamation (including the very authors of this book) are concerned to secure some relaxation of the stringent rules of libel which at present prevail, and no word is uttered about the serious encroachment on the liberty of the press that would inevitably follow.

A similar divergence of view between two contributors (or in this case it may even be the same contributor) appears at page 74, where there is a bitter complaint that the law is weighted in favour of insurance companies because of the high duty of disclosure imposed on the insured, followed by a milder grumble on page 76 that "English law knows no duty of care to make proper disclosure to the other party to a prospective contract"

Again, the rule requiring the prosecution for felony before a civil action is brought for damages is attacked, but its salutary purpose is neglected, and no indication is given of the very limited scope of its operation in view of the absence of any similar rules in regard to misdemeanours. A reference is made to *Re Polemis*: while a strong case can be made out in logic for the principle enunciated in this case, the authors of this book give no indication of the nature of this principle, and the lay reader will simply be left with the impression that it reflects some peculiar iniquity of the legal world against which he should rightly inveigh.

The vice of introducing political considerations into a work of this type is well evidenced by the chapter on civil liberties, which is entirely concerned with a consideration of the position of aliens and of theatre and cinema censorship. It is really little short of a disgrace that lawyers dealing with their own system of law should fail to convey to the outside world the elaborate protections and safeguards (operating for citizens and aliens alike), which are unequalled in the English system for the protection of human liberty, and should be satisfied to leave an impression that this branch of our law is as unsatisfactory as every other branch to which they have referred. It is pathetic, however, that when dealing with this topic, no reference should be made to the serious encroachments on the liberty of the subject (whether for good or ill) which have been introduced during the last few years and that the whole concern of the writers should be focused on so narrow a field. Why the hoary topic of theatre and cinema censorship is introduced it is difficult to understand. The present reviewer has a reasonable knowledge of the operation of theatrical and cinema censorship: it is doubtful whether there is any feeling today that the liberal and emancipated exercise of the Lord Chamberlain's powers is a burning matter for change. In fact, had the writer of this particular section been a theatregoer of experience, he could very easily have satisfied himself that there are very few topics suitable for adult discussion which are banned for public presentation on the English stage. It is true that where plays deal with sexual perversions, the Lord Chamberlain still maintains an attitude which the authors may regard as old-fashioned, but it is difficult to impeach his office on that solitary score and the matter has a quaint Edwardian flavour. There is, of course, graver objection to be taken to the British Board of Film Censors, but its inadequacies and anomalies are those of an industry which respond to an "Alice in Wonderland" direction and which could hardly have been dealt with if the whole book had been devoted to the fascinating subject.

An intriguing feature of the book is in the instances of suggested reform, which provoke an immediate and hitherto unsuspected partiality for the institution which is being tilted at. Illustrations could be multiplied but a few must suffice. At one place, the writer becomes almost eloquent in denouncing the English rule that (except in certain cases) an unlawfully deprived owner can recover his property from an innocent purchaser. Since such a case necessarily involves hardship, the present rule seems just and fair and sensible and the suggested reform to propound a Burglars' Charter. On any footing it is hardly a matter of crying importance in law reform. At a second place we are told that "there is no duty of care to prevent animals straying on a highway," with the inference that there should, of course, be such a duty. One is prompted to ask "Why?". At a third place, it is proposed that "jurisdiction to make separation orders should be transferred from magistrates to the county court." No reason is given for the proposal and one is left to suppose that the author's desire is to ensure that in such matters a trained judge rather than a lay magistrate should adjudicate. But this surely is an argument in favour of stipendiary magistrates or in favour of transferring the entire function of lay benches to trained lawyers.

To sum up, a somewhat tepid welcome can be extended to this book in regard to its intentions. It has largely failed to fulfil those intentions and in some respects it has done a positive disservice to them by professing to have dealt with matters which call for more careful, thoughtful and mature consideration. The worst fault of the book is the general atmosphere it seeks to create, that English law is, by and large, in a doleful plight, needing the healthy remedies which can only be administered by left-thinking progressives. It would, however, be unfair to imply that some portions of the book are without considerable merit. The section on Landlord and Tenant is carefully explained and sensibly argued. Again, nothing but praise can be extended to the proposed reforms in our ridiculous laws of evidence and the

condemnation of the McNaghten rules conforms with the feeling of every humane person—although once again the immense difficulties of this subject are largely scouted.

The reviewer has not dealt with the main theme of the book—or its professed main theme—which is the establishment of a Ministry of Justice. At this stage, he can only heave a heavy sigh at the naiveté which considers that the establishment of an additional Ministry is the universal panacea. It is not the Ministry of Justice which will achieve any object, but the Minister, and if suitable persons exist to undertake such reforms as are admittedly necessary they will attain their end without elaborate changes in the administrative framework of the law. While many of the contributors cast envious eyes at institutions in other systems of law, they might be well advised to look to the operation of law in other countries to recognise some of the horrors from which the English system has spared us and the transcendant blessings of judicial tradition and impartiality as fostered by the English common law. They need not go farther than the lists of their own publisher to read, for a start, *Murder, Inc.* (an unbelievable record of a nationwide gang of thugs and assassins in the U.S.A.); *Crime in America*, an account by Senator Kefauver of the proceedings of his Senatorial Committee; *Courtroom*, a biography of Sam Liebowitz, an outstanding American criminal lawyer, who for a time defended the Scottsboro negroes; and *Scottsboro Boy*, the tale of one of those negroes. One may not learn how satisfactorily the doctrine of consideration operates in America, but even the most determined progressives may get an inkling that there are perhaps more significant aspects of law reform even than the doctrine of consideration.

A. GOODMAN.

APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS. By JOSEPH HENRY SMITH. [Columbia University Press: London: Geoffrey Cumberlege.]

THIS is one of the publications of the Foundation for Research in Legal History of the Columbia University School of Law. It deals with the appellate jurisdiction of the Council, as I propose to describe the Privy Council or the Committee of it which dealt with appeals, from the late seventeenth century until the Peace of Paris in 1788. It is a long book, running into more than 600 pages, thorough, authoritative, and interesting. Mr. Joseph Henry Smith, the author, has spared no trouble in his researches, which have comprised England, the States of the Atlantic coast, the Channel Islands, and Jamaica, and he is to be congratulated on the combination of industry, patience, and insight, which his book displays.

In his first 40 pages he deals with the appellate relations between the Crown and the Channel Islands. The islands are part, and a small part, of the original overseas dominions of the Crown. In the latter part of the seventeenth century they were the only part which still remained within the Crown dominions, where they have continued until this day. Mr. Smith speaks with unsurpassed authority on the history of their legal connection with the Council up to 1788. The elements of an appellate system and jurisprudence between the Council and the islands had begun to assemble themselves over a long period of years before the end of the seventeenth century and proved to be of service when it became necessary to develop appellate relations between the Crown and territories across the Atlantic far exceeding in size the whole of the original overseas dominions. It is impossible to enter into detail here about the relations between the Channel Islands and the Council. It is not a dull story. There is a good deal of human interest in it. I confine myself to mentioning one curious result of this appellate relationship, *viz.*, that it

appellate tribunal in the case of a general verdict would not normally set out all the evidence which had been given at the trial. If the verdict was special, the Council might reverse the lower court and might give the judgment which ought to have been given below. Another problem arose from instructions sent by the Council in December, 1758, to the Governors of colonies that the Governor on application being made should "permit and allow appeals from any of the courts of common law" in the province to the Governor and Council, *i.e.*, the colonial Council. Up till then such instructions had usually provided for these appeals "in cases of error," but those four words, which referred to the well-established common-law method of appeal by writ of error, were conspicuously absent from the instructions of December, 1758. Did the Crown by these instructions, which did not contain those four words, intend to establish a new method? Was this a proposal to give jurisdiction to another court to examine a jury's findings of fact and so to destroy the long-established rule of English law that the verdict of the jury on the facts was final? The point came up in the Supreme Court of New York in 1764 (I quote Mr. Smith) "in an episode which shook the province." The repercussions of it were felt through the States along the Atlantic coast. The name of the case was *Forsey* v. *Cunningham*, and it arose upon an action for assault, battery, and wounding committed in 1768. The jury assessed the damages at £1,500 and the costs at sixpence. An attempt was then made to bring an appeal not by writ of error but by a new kind of writ based upon the new instructions. The Supreme Court declined to entertain it and rejected the interpretation of the instructions, upon which it was based. The matter was before them again in November, 1765, and they then declared that the law knew of no appeal from a verdict, and the case came to an end. If the times had been more propitious the Council would perhaps have done something to achieve a final solution of these and other problems of appellate procedure, which were bound to arise, as the stream of appeals continued to flow.

Another controversial matter was the question, how far English statutes applied to the colonies. The controversy led men or at any rate lawyers into much cogitation upon *Calvin's Case* (1608) which had been argued in the Exchequer Chamber by many distinguished lawyers. Sir Edward Coke in his report of it had assumed, *e.g.*, in his observations about the Channel Islands, the distinction between the realm and the dominions of the King not parcel of the realm, and had also distinguished between territory conquered from a Christian king and territory conquered from infidels "whom the law presumed to be perpetual enemies." He had also pointed out that in the case of a distinct dominion Acts of Parliament might bind by express reference. Then in 1722 the Council through the Master of the Rolls published the so-called "Privy Council Memorandum" about the reception of English law in newly settled countries. Amongst other things it was there declared that a new and uninhabited country discovered by English subjects was to be governed by the laws of England, but, after it was inhabited by the English, Acts of Parliament not naming the plantations would not bind them. As this declaration was printed in the second volume of *Peere Williams'* reports, which were used and esteemed on both sides of the Atlantic, it became widely known and presumably achieved a considerable influence also. The controversy was prolific and branched out into many questions, *e.g.*, what regard should be paid to the distinction between statutes affirming and statutes altering the common law or between statutes passed before and those passed after the date of the settlement of a colony? There were currents and cross-currents of opinion. I mentioned above the statement in the "Privy Council Memorandum" as to any Act of Parliament passed after the settlement of a colony, that it did not apply to dominions of the Crown unless it specially mentioned them. The colonists would not tend to emphasise that maxim, if they wished to argue that the benefits of the Habeas Corpus Act of 1680 (31 Car. 2, c. 2) extended to the colony, but they might tend to emphasise

it, when they wished to claim as wide a scope as possible for the exercise of legislative powers by their own colony. The Statute of Frauds of 1677 (29 Car. 2, c. 3) had a somewhat remarkable history in Jamaica as regards this issue of applicability. The courts of Jamaica decided in 1709 in *Orby* v. *Long*, a case about a will, that the statute applied in Jamaica, and in 1710 the Council reversed this decision, holding that the statute did not apply there. But the island did not intend to abandon its claim to the application of the statute and in 1722–28 passed an Act declaring various English statutes, including the Statute of Frauds, to be law in Jamaica. This Act was disallowed by the Council. When in the following January a judgment of the lower court in Jamaica which proceeded upon the basis that the statute applied in the island was carried to the Court of Error and that court had to decide whether it did so apply or not, it was evenly divided, and the judgment of the lower court was therefore confirmed.

An important constitutional question was much controverted, *viz.*, the question of the right of the Council to review the validity of colonial legislation. Section 9 of a statute of 1696 (7 & 8 Will. 3, c. 22) provided (in effect) that, if any "plantation" passed a law repugnant to the laws of England so far as they related to the plantation, that law should be illegal, null and void. Two forms of declaration were developed in the course of the application of the statute, one declaring the colonial Act void *ab initio* and the other disallowing it as from the date of disallowance. Declarations were made in both forms and the normal course was for the Council to make them in non-judicial proceedings. A declaration of voidness *ab initio* was made judicially by the Council in the case of *Winthrop* v. *Lechmere*, which is one of the most famous of the appeals from the American colonies in the eighteenth century. Several colonies did not wish to maintain the distinction between realty and personalty in the rules of devolution upon intestacy which was established in English law, and preferred that the rules in respect of realty in that event should be the same as the rules in respect of personalty. The colony of Connecticut in 1699 passed an Act which gave effect to such a preference. The colony of Massachusetts had passed a similar Act in 1692. The Connecticut Act came before the courts in *Winthrop* v. *Lechmere*. The litigation began in 1724 and in December, 1727, the Council declared against the validity of the Act and allowed Winthrop's appeal. That, however, did not conclude the matter, and the English authorities seem finally to have (I quote Mr. Smith) "capitulated to the colonial view on intestate succession." The Crown sometimes issued instructions requiring certain clauses to be included in a colonial Act, *e.g.*, a suspending clause which said that the Act was not to come into force until it was approved by the King in Council. Mr. Smith has found many instances of disobedience to these instructions and of resulting disallowances, but there seems to be no instance of such disobedience leading to a declaration that the colonial Act was void *ab initio*. Disputes about annulling and disallowing continued into the years when the onset of the political storm between the Crown and the American colonies had become plain. Indeed a man may have gone to the Council and seen Lord Mansfield sitting there and heard some argument about constitutional law in an appeal from the colonies, and the same man may have gone to the House of Commons, where a debate was proceeding about American discontents, and listened to Burke entreating his fellow-members to remember that magnanimity in politics is not seldom the truest wisdom.

The reader who brings some imagination to his reading of the text and of the notes of this book will form for himself an interesting picture of the circumstances of these appeals to the Council, especially in the eighteenth century. Each party submitted to the tribunal copies of a printed "case" signed by counsel. It was ordered by the Council in 1780 that no printed case should be delivered to the Council unless one or more of the counsel who were to attend the hearing had signed it. The solicitors of the parties did

not merely hand the "cases" to some official of the Council for distribution but delivered "cases" to the Lord President and to such Law Lords as were likely to attend the hearing. Charges by solicitors for this work are found in the Appendices to this book. The members of the Council who heard the arguments tendered a report or advisory opinion to the King in Council, and it seems that the ground for their advice did not usually appear on the report. Hearings before the Council took place in the Cockpit, which was near the site of 10 Downing Street. They were public, but they were not reported regularly, until Jerome W. Knapp began his reports in 1829. Across the forensic stage, which the book sets before us, there pass some memorable figures of the Bench and Bar, *e.g.*, William Murray, who became Chief Justice of the King's Bench in 1756 and Earl of Mansfield, Charles Pratt, who became Lord Chancellor in 1766 and Lord Camden, and John Willes who was Lord Chief Justice of the Common Pleas from 1737 to 1761. We meet too Francis Maseres, who was Attorney-General for Quebec for three years and then returned to London and became Cursitor Baron of the Exchequer. I ought perhaps to say that we meet him again, for we have met him before in Lamb's essay on "The Old Benchers of the Inner Temple" and in one of Lamb's letters to Manning. Mr. Smith introduces us also to an interesting and important body of men, the agents of the colonies in London, accredited (as it were) on behalf of the colonies to the Council and the departments of State, *e.g.*, Paris, Bollan, Charles, Partridge, and three of the agents for the colony of Connecticut between 1700 and 1770, Sir Henry Ashurst, Francis Wilks and William Samuel Johnson. None of them takes up more space in the Index than Ferdinand John Paris, who was agent for New Jersey and acted at least once for a client in the older Jersey on the other side of the Atlantic from which the American colony derived its name. He was briefed on the side of the clergy in the great Virginian cause of *Camm* v. *Hansford*, which came to pass because the colony enacted that the payment of clerical salaries, instead of being made in tobacco, might be made in money. The clergy lost their appeal, but none the less they are reported to have "maintained that the action could not have been better laid being done so at the advice of learned and astute Ferdinand John Paris." The praise of a client who had lost is praise worth having. There are interesting glimpses of the activities of the agents. They took counsel with one another and arranged to act together, as the turn of events might require, in the protection of colonial interests. It was, no doubt, part of their duty to disseminate information, geographical and other, about the colonies. Johnson records that he heard in Westminster Hall "a respectable counsellor at law ask Mr. Jackson gravely . . . whether Philadelphia was in the E. or W. Indies." I take Mr. Jackson to have been the agent of that name, whom Mr. Smith mentions, and he no doubt contrived a form of reply which tactfully removed the misapprehension of his learned interrogator. The agents kept in close touch with important people. Ashurst, for example, seems to have been on friendly terms with both the law officers at the beginning of the eighteenth century. We have to thank Mr. Smith for an interesting as well as a learned and an instructive book.

C. T. Le Quesne.

Law in the Making. By Carleton Kemp Allen, M.C., Q.C., D.C.L., F.B.A., F.R.S.L., J.P. Fifth Edition. [Oxford: Clarendon Press. 1951. 85s. net.]

In the preface to the new edition, Dr. Allen confesses to a pleasant surprise that *Law in the Making* is still going strong after 24 years. To the many users of Dr. Allen's book this is not so surprising. It is not only Dr. Allen's felicitous and easy style which makes him carry his learning more lightly

than is the case with most of his fellow writers on this subject. The book also has a quality which appeals particularly to the English lawyer. Its approach is historical, and the theoretical discussions about law and its sources are discursive and inductive rather than fundamentalist or deductive. The book is permeated by a firm belief in the traditional English approach to legal problems, while being critical, and at times devastating, about the deficiencies both of the legislative and judicial process.

The present edition has remained unaltered in approach and scope, but the material has been thoroughly revised. The illustrations in the long chapter on Precedent consist now to a large extent of very recent decisions. Dr. Allen has also dealt with various recent writings, for example, on statutory interpretation and delegated legislation. None appears to have led to any modification of Dr. Allen's well-known views on these topics. The place of this book is now so assured, the appearance of future editions so certain, that a reviewer can perform a better service than that of the usual eulogy. The present reviewer has learned much of his English jurisprudence from *Law in the Making*, and he has also used it as a teacher of jurisprudence in different common law jurisdictions. It is, therefore, with a sense of respect and gratitude that he submits some criticisms. They are of two kinds. Some concern certain deficiencies of the book, granted its own premises; others are concerned with the major premises underlying Dr. Allen's approach to certain vital problems of jurisprudence.

The book is mainly concerned with the four major sources of English law: custom, precedent, equity and legislation. In the third edition, Dr. Allen first prefaced it with a short introduction to legal theory called "Law and Its Sources." Except for some references, the introduction is still the same, and the present reviewer's respectful opinion is still that it lessens the value of the book. A discussion of certain problems of sovereignty, and their bearing on the sources of law is indeed apposite. A discussion of such writers as Austin, Kelsen, Duguit, and perhaps Savigny and Ehrlich, would, therefore, make an organic introduction to a book concerned with the sources of law. But Dr. Allen has added to it a selection of writers and theories concerned with the ends and purposes of law. The result is 60 pages of an elementary discourse on certain aspects of legal theory, which can hardly satisfy anybody, especially as, contrary to the author's general approach, this section of the book is strongly tainted by his personal predilections and antipathies. The discussion of Kelsen—probably the most over-dissected jurist of our time—is certainly lucid and stimulating, although Dr. Allen's slightly condescending assumption that the English lawyer is not "prone to confuse the legal and the political" and that "nothing is more repellent to Anglo-Saxon legal instinct than the corruption of law by political ideology" is perhaps a trifle naive. Dr. Allen still adheres to his view that the Grundnorm is the weakest part of Kelsen's doctrine because you cannot, for example, easily find out who is the sovereign in the United States. As has been pointed out before, the fact that in a particular political society sovereignty is divided between different organs of the constitution does not in any way affect the thesis that there is an ultimate assumption underlying each legal system which is not itself capable of proof or deduction. In that respect, Kelsen's theory says in abstract terms exactly what Holmes, Cardozo, Stone and other eminent American judges have taught and practised in the United States.

It is greatly to be deplored that Dr. Allen has not found it necessary either to omit or to revise his four pages of "Realistic Jurisprudence," which, it is submitted with the utmost respect, are not in keeping with the general standing of the book and the author. Dr. Allen does not consider it necessary to quote any of the writers or theories which he attacks, except for a reference without name to one passage in Frank's *Law and the Modern Mind*. Dr. Allen obviously formed his view of the realists in the early 1930's, and has never followed their work any further. The realist movement is certainly

not easy to classify, because it represents little more than a general way of thought based on the philosophy of James and Dewey. Moreover, its predictions were often extravagant in their attack both on the analytical and teleological jurisprudence. For all that, the realist movement is an essential part of American life and thought; it has produced a great deal of provocative and searching writing, and at least some works of classical standing. Among them are Thurman Arnold's *Symbols of Government* and *Folklore of Capitalism*, Jerome Frank's *Law and the Modern Mind*, and Berle and Means' *Modern Corporation and Private Property* The influence of these works on modern legal thinking has been decisive. The realist movement, as a whole, represents characteristic American virtues and weaknesses: extravagance and some bombast, together with remarkable vitality and freshness of thinking, and an urge for experimentation. The English and American approach to legal problems is in many ways very different, despite their common background. Mutual understanding between them has never been more necessary. Dr. Allen's four pages on realism would be taken by many as representative of modern English jurisprudential thinking, and this is a great pity.

As regards the introductory section as a whole, I respectfully submit that, short of a fuller treatise on legal theory, which would probably not fit into the scope of the book as a whole, Dr. Allen might confine it in future editions to a discussion of the relation of sovereignty and the law.

It is with relief that one passes from the introductory chapter to the main sections of the book, with their extremely high standard of scholarship and discussion. The chapter on Precedent, which has been largely rewritten, is still characterised by the author's felicitous blend of mastery of detail with a balanced presentation of the major issues behind it. In the present as in the previous editions, I have always felt that the chapter would gain by greater conciseness. In particular, the final section on the practical working of precedent seems in many ways to be an unnecessary repetition of the first section. In both, the extreme practical difficulties of the principle of *stare decisis*, the conflict of authorities, the difficulties of distinguishing a dictum from the *ratio decidendi* are brilliantly demonstrated, but the material used and the conclusions reached are practically the same. The effect of this repetition is an anti-climax. Despite the now overwhelming evidence of the difficulties of the analytical precedent doctrine—which nobody can demonstrate more brilliantly than Dr. Allen—he remains convinced that it is still by and large the best system for the development of English law. This goes together with Dr. Allen's view that "if Parliament has to intervene in the development of the law, it should intervene as little as possible" (p. 479). Such a phrase is, of course, capable of most divergent interpretations, but even from the author's point of view, it depends entirely on the judges taking a view of their function which very many judges do not take: that they should use the many gaps, inconsistencies, contradictions, which leave a choice of alternative solutions for the development of the law, in order to adapt it to changing social needs and problems, within the limits set by the decision of a particular case. But it seems that at this point Dr. Allen refuses to think further. He is torn between his reverence for the time-honoured methods of English law-making—coupled with his belief that English judges are normally free from prejudice—and his analytical conclusion that the development of the common law becomes stultified, and large scale legislative interference indispensable, if the judges refuse to develop the common law creatively. Hence, the reading of the present edition, as of former editions, leaves the critical student with a feeling of inconclusiveness and dissatisfaction. This is not because any of us knows all the answers. It is because Dr. Allen refuses to face the problems of the judicial process in the way in which the greatest of the American judges and at least one of the contemporary English judges face them. His choice, as well as his interpretation of decisions reflects this

approach. Dr. Allen constantly attempts to explain imperfections of the precedent system by technical reasons, by difficulties in distinguishing between ratio and dictum, by ignorance of relevant precedent, by the difficulties in following conflicting but equally binding authorities, and so on. He hardly ever hints that there is a basic conflict of philosophy, no less acute in England because it is more concealed than in countries where the courts have political instruments to interpret, and where they, consequently, are used to facing conflicts of political philosophy in legal disguise. There has, for example, been a radical difference of approach between the present House of Lords and that in which Lord Wright and Lord Atkin played a large part. From the early 30's to the middle 40's the House of Lords exercised a decisive influence on the adaptation of many branches of the law to new social needs. The majority of its members then believed in the common law as a growing organism which had to develop side by side with the action of the legislator. The philosophy of the present House of Lords is that of emphasising traditional categories, however meaningless in modern times, and of refusing to use the many ways of creative development, which Dr. Allen so ably discusses, for the rationalisation of law. Strangely enough, Dr. Allen quotes Lord MacMillan's dictum in *Birch* v. *Brown* [1931] A.C., but not his more recent and radically different dictum in *Read* v. *Lyons* [1947] A.C., in which he denies that it is a task of Her Majesty's judges to help in the rationalisation of the law in England. Dr. Allen himself has criticised the decision in *Liversidge* v. *Anderson*. He has missed a wonderful opportunity in not contrasting the reasoning in that case with the reasoning of the House of Lords in *Roberts* v. *Hopwood*. Had he done so, he might not have been so complacent about the absence of ideology in the decisions of English courts. Dr. Allen rightly criticises the more extreme assertions of prejudice made by such writers as Jennings or Laski in their earlier writings, but he refuses to mention or discuss the decisions which at least emphasise the problem.[1]

Problems of statutory interpretation are closely related to the theory of precedent. The whole tenor of Dr. Allen's argument is pessimistic. The existing rules make almost any kind of approach to statutory interpretation possible and capable of ample justification by authority. If Dr. Allen accepted the logic of his own analysis, he would probably arrive at something like the "common sense," or "intuitive," or "hunch" approach to statutory interpretation, at least in the marginal cases. But then, Dr. Allen has previously rejected with some scorn such suggestions made by Frank and other realists. Hence, he concludes the section with the sentence that "What seems to be needed most of all is a more scientific consistency of principle." To one reader at least the previous hundred pages seem to have conclusively shown that such scientific consistency cannot be attained by the use of present rules, and that it has utterly eluded the most brilliant judicial minds. Hence, the present reviewer suggested some years ago that it might help if we did not treat statutes as being all of one kind, but distinguished between constitutional documents, taxation statutes, penal legislation and other types of statutes. This was not meant as an answer to all the problems, but as a guide which would make the problems of statutory interpretation more definite and intelligible. But Dr. Allen specifically rejects this approach. It is, therefore, difficult to see what he can mean by a more scientific consistency of principle. His previous argument has shown that such consistency does not seem to exist, while he refuses to explain how it could be attained.

These criticisms do not detract from the admiration for the brilliance and learning of a work which is now classical. Like every mature jurist, Dr.

[1] For a fuller discussion of this whole problem, see the present reviewer's article on "Judges, Politics and the Law," in the *Canadian Bar Review* for October, 1951.

Allen knows that there is no simple answer to the complex problems of jurisprudence. The chief merit of the book probably lies in this very quality; it does not dogmatise or give superficially certain answers; it compels the reader to doubt and to think. This is one of the privileges as well as one of the burdens of a free society.

W. Friedmann.

The Evolution of Law and Order. By A. S. Diamond, M.A., LL.D., Barrister-at-Law. [London: Watts & Co. 1951. viii and 842 pp. 21s. net.]

Much has been added to our knowledge since the time of Sir Henry Maine. We now know that the connection of law with religion, the priestly-aristocratic monopoly of legal knowledge, the rigidity of legal forms and the importance of procedural rules are characteristic not of the earliest but of a comparatively late stage of social and legal development. Maine began at the beginning of legal history, but behind legal history there lies a long prehistory, the materials for whose investigation were not available to him. Among the investigators and exponents of this prehistory Dr. Diamond is outstanding. His *Primitive Law*, first published in 1935, is already something of a classic. Its theme is expanded in the present work, which is addressed to readers who need have no previous knowledge of law or of anthropology. Dr. Diamond disagrees with those who believe all civilisation to have been diffused from a single centre of origin, preferably Egypt. For him it is the economic level of a people that determines its civilisation, of which its law is "the distilled essence," and legal institutions undergo "a common process of change as civilisation advances." Admittedly many peoples have imported legal institutions from others, but only when they were economically ripe for them, and he finds many instances of legal similarities among peoples of the same economic level between whom borrowing is inconceivable. His work is, therefore, primarily a generalised economic history tracing the progress of man from "savagery" (the stage of food-gathering followed by the beginnings of agriculture) through "barbarism" (the beginning of cattle-keeping; the period of the early codes) and "early civilisation" (when pastoralism and agriculture equally provide the sustenance of the people and when villages and towns and organised markets are to be found; the period of the central and late codes) to "the modern age." His generalisations are sometimes sweeping. The stage of the late codes, for instance, is to be found in England from A.D. 1100 to 1800, in France and Italy from about A.D. 1000 to 1250, in Palestine in the time of the Old Testament, in Rome in the time of the Twelve Tables, in Athens in the eighth and seventh centuries B.C, in Assyria about 1400 B.C., in much of India from the ninth century B.C. to the seventeenth century A.D., and in much of China during at least the last three thousand years, at the beginning of legal history in Sumer and Babylon about the end of the third millennium B.C. and in modern times in the Abyssinia of 1935 and among the great majority of the nations of Nigeria, the Gold Coast and Ashanti. What is there common to all these peoples? Many things, according to Dr. Diamond "Never again does religion hold such power over the mind of man . . . the jurisdiction of ecclesiastical courts is at its height" (at the end of this period comes the parting of the ways and some peoples advance to a theocratic government in which the ecclesiastical courts oust all others, other peoples to a secular government in which the jurisdiction of the ecclesiastical courts is limited or disappears altogether). . . . "Feudalism is at its height but begins to wane before the end of the period. There is a far-reaching economic advance, and money is now in wide use, and the banking or deposit of money is first seen. Towns show a great spread in number and size, and there is a notable increase in the extent of specialisation in trades

and occupations. The same age gives birth to the world's great legal systems in Babylon and Rome and England. The law of crimes and the law of civil wrongs continue to grow closer together, and now they are at their nearest, but are about to grow apart again. The blood feud is at its height. Intentional homicide is punishable with death, and in regard to serious wounding the doctrine of an eye for an eye and a tooth for a tooth makes its brief appearance."

It is not possible, at least for one unlearned in anthropological studies, to check Dr. Diamond's use of evidence. He tells us that his book is "a collation of the best information available as to several thousand tribes and nations" and that considerations of space have made it impossible for him to do justice to the mass of evidence on which many of his statements are based and have compelled him to content himself with citing only a few instances. Nevertheless, it can be said that he has produced a remarkable amount of detail, even if in summarised form, to support his thesis of concurrent economic and legal development. The legal historian and the sociological jurist should alike profit from his work. The former will find instructive parallels and perhaps a clue to the meaning of some institution inexplicable if studied in isolation; the latter will gain depth for his picture of law as the product of social needs.

A. H. CAMPBELL.

SUPRA CREPIDAM. By THE RT. HON. LORD COOPER. [Edinburgh: Thomas Nelson & Sons, Ltd. 7s. 6d.]

THE contribution made by the Parliament House to Scottish scholarship has never been restricted to the law; and there is a robust tradition of refusal to stick entirely to the legal last. Lord Cooper, with men like T. B. Simpson and J. R. Philip, maintains this tradition today. For the Lord Justice-General the more abstruse the problem, the greater the intellectual excitement. His recent small book contains his four presidential addresses to the Scottish History Society, and we may applaud the enterprise of Messrs. Nelson who have made them available to the educated public in general.

Each of the four papers certainly justifies the learned author's contention that it is sometimes useful to apply the technique of one subject to the elucidation of another totally different subject. One may reflect on the debt which Military Intelligence owes to dons and to training in the laws of evidence; or, in another field, on the debt which Western theology owes to the technique and terminology of Roman jurisprudence. Lord Cooper applies in succession the techniques of law, cartography, astronomy and literary criticism to help solve the problems of the historian.

For his first paper the author has chosen his text from Holdsworth's *History of English Law*, "History can humanise law and law can correct history; together they accomplish much that neither can accomplish alone." He illustrates his point by references to pre-Union Scottish statute law. The Scottish lawyer may well ask the historian for an explanation of those periodic outbursts of statutory reform in private law, which were clearly designed to cope with urgent contemporary problems, but which have also had a permanent effect upon the Scottish legal system. Lord Cooper cites as illustrations the fifteenth century legislation aimed to benefit the "puir tennentes" or "the puir people that labouris the grund." These measures do not belong only to the province of the legal historian. Herein is to be found the basis of the Scottish law of leases, the provision of greater security of title for landowners and tenants, and the freeing of land from feudal restrictions upon alienation *inter vivos*. Lord Cooper calls on the historians to explain why this legislation should have been passed when it was, and he points out that the periods marked by these reforms are generally regarded

by historians as rather dull and uneventful. What explanation can be offered for these concessions apparently extorted from the powerful minority in favour of the politically impotent majority? There is no record of a Tiberius Gracchus or Langland in fifteenth century Scotland, nor were the governing classes renowned for their enlightenment. The historians may assess the part played by public opinion, or by fear of peasant revolt.

The Lord Justice-General also discusses that remarkable body of seventeenth century legislation which introduced the positive prescription, public registration of deeds and other enactments to suppress fraudulent dealings in land. About the same time, legislation which is still in force was passed to frustrate fraudulent debtors. Fraud and chicanery seem to have flourished in Scotland during the sixteenth and seventeenth centuries, and Lord Cooper—elder and staunch Presbyterian as he is—has a tilt at the godly when he comments upon the concurrence of wholesale fraud and the victory of John Knox.

Lord Cooper contends that, in contrast with the common law countries, the bulk of pre-Stair Scots law is statute law. Many of these admirably drafted enactments remain in full vigour today. Accordingly, one may deplore the oversight of those responsible for the third edition of *Statutes Revised* who, having dealt carefully with all English statutes from 1285 onwards, entirely overlooked pre-Union Scottish legislation. They may plead that the doctrine of desuetude makes revision of the Scots Acts a somewhat complex undertaking, but to ignore them is scarcely excusable. After a perusal of Lord Cooper's book, one may also question the sweeping judgments of some historians regarding the vision and capacity of the men charged with the ordering of Scottish affairs during those decades which, though rejected by the historians, have provided the cornerstones of the Scottish legal structure.

The fourth paper, dealing with the Declaration of Arbroath—the Scottish barons' declaration to the Pope in 1320 urging His Holiness to restrain the English and to recognise Robert the Bruce as King—does not deal with constitutional implications. Nevertheless, it deserves the attention of legal historians on broader grounds. The sonorous periods of the Declaration, like some clauses of another great constitutional document signed during the previous century at Runnymede, have helped to compel the reverence of posterity for the substance.

Lord Cooper's book may be commended for its brevity, its clarity, its freshness and for the encouragement which it provides for critical thought and for the breaking down of academic frontiers.

T. B. SMITH.

A PROSPECT OF GRAY'S INN. By FRANCIS COWPER, of Gray's Inn, Barrister-at-Law. [London: Stevens & Sons, Ltd. 1951. 187 pp. 30s.]

THE Inns of Court—"unchartered, unprivileged, unendowed, without remembered founders" as Maitland described them—form a fascinating study, both as professional associations and as social and educational institutions. The main sources dealing specifically with the history of Gray's Inn are the Pension Books from 1569 (in MS. from 1800), the Admission Registers from 1521 (in MS. from 1889), Douthwaite's *Gray's Inn: Its History and Associations* (1886), *Gray's Inn Library* (1929), several short histories by Sir Dunbar Plunket Barton and others, and articles in *Graya* from 1927. We cannot trace how the manor of Purpoole with pasture and ploughland and windmill and dovecote became Gray's Inn, but it belonged to the family of de Grey and we know the names of some of the fourteenth-century members of the Inn. Though the extant records begin as late as 1569, not long after that date the Inn could count among its members Lord Burghley, Francis Walsingham, Sir

Nicholas Bacon, Lord Howard of Effingham and Sir Philip Sidney. Its brightest legal luminaries have been Sir Anthony Fitzherbert, Sir Francis Bacon and Sir John Holt. In the twentieth century it has been adorned by Lord Birkenhead and Lord Atkin. The number of its judges is probably less than those of the three other surviving Inns, for it is the smallest; but it has contributed a remarkable number of persons distinguished in Church and State.

Mr. Cowper has most successfully selected and condensed his material, preserving the balance between biography, architecture, and the structure of the legal profession. That he could have written a book of this size from the biographical standpoint alone is evidenced by the sketches he has contributed to recent numbers of *Graya*. We are given a vivid description of the life of the lawyers, the masques and revels, in the time of Elizabeth and James I. There follows a carefully impartial account of the effects of the Reformation and the Civil War. The Civil War and the Commonwealth saw the end of the readings and revels, and the decay of legal education. It is shown how the buildings had become by the end of the eighteenth century more or less as they were in 1940, though it must be difficult for young members to visualise them unless they are fortunate enough to possess copies of *Country Life* for November 6 and 13, 1937. Coming to the nineteenth century we see how the industrial revolution led to a great increase in the number of barristers, and, paradoxical though it seems when we consider the medieval boundaries of London, it was then that Gray's Inn became remote. The author does not gloss over the decline of the Inn in the early 70's, but this adds drama to the story of its revival at the end of the century with Tim Healy, Atkin and F. E. Smith. Our spirits rise with the increased vitality shown in the twentieth century, only to be depressed again by the severe war damage. The story ends on an optimistic note with the resumption of dinners and the plans for reconstruction. Mr. Cowper endorses the decision to give priority to the rebuilding of the Hall, which was opened by Master H.R.H. The Duke of Gloucester on December 5, 1951—for the Hall is, and always has been, "the very heart of the Society's life."

The book is written throughout in a pleasing style. It is a handy size, and will interest a wide range of readers, legal and non-legal. All members of the Inn will want to have a copy. There are seven well-chosen illustrations of the buildings at various periods, and an engraving from Lincoln's Inn on the dust cover. The Treasurer, Sir William McNair, provides a foreword. Lists of Treasurers from 1901, of present Benchers and of members associated with America, a bibliography and an efficient index complete the book. The publishers did well to bring it out in time for the re-opening of the Hall, but surely the price is unreasonably high for a book of this size.

The smooth flow of the narrative is not obstructed by excessive detail, but it does contain a number of facts that will be new to most readers. Two things that we learned were that the Court of Exchequer sat in Gray's Inn Hall during vacation from 1789 to the middle of the nineteenth century, and that the three-sided iron stove in Henekey's wine bar next door to Holborn Gate is the one that used to stand in the middle of the Hall. Some will be specially interested in the literary associations, which include (besides Philip Sidney and Francis Bacon) William Shakespeare, John Evelyn, Samuel Pepys, Dr. Johnson, Charles Lamb, Charles Dickens, W. M. Thackeray and Hilaire Belloc—not all members, of course. Others may be more moved by the thought of the thousands of obscure lawyers over the centuries who have lived and dined in the Inn, and who have left not even a memorial such as Sam Denton pasted in his satinwood tea caddy: "My mother gave this tea caddy in the year 1790 or 1791 when I went to reside in my chambers. . . . I never will part with it. Oh, how I admire my tea caddy and my silver cream jug. I am 76 next birthday, Sam Denton."

O. HOOD PHILLIPS.

THE SALE OF GOODS. By CLIVE M. SCHMITTHOFF. [London: Stevens & Sons, Ltd. 1951. xxviii and 272 pp. (with index). 25s. net.]

THIS is the first volume in a new series on Business Law and Administration, of which Messrs. Stevens have undertaken the publication under the general editorship of Dr. Schmitthoff. In his preface to the present volume the editor explains his general aims as being to link the exposition of the legal principles and rules relating to particular branches of business with the practical needs and requirements of those engaged in their pursuit, and he quotes wise sayings from Charles Molloy and Lord Mansfield, each of whom in his own way did so much to establish our commercial law as a sound and useful branch of our jurisprudence.

In selecting *Sale of Goods* for the initial essay Dr. Schmitthoff has certainly chosen the branch of commercial law which affects much the largest number of business men, and he has undoubtedly added an excellent and up-to-date textbook on the subject to the substantial number which already exist. At the same time, it can hardly be said that the present volume has such distinctively practical characteristics as to differentiate it from all its predecessors. For the business man its value will presumably be in its much fuller treatment of the subject than was possible in the smaller volumes contributed by such writers on the subject as Professor Eastwood and Mr. Austin. I am myself, however, very doubtful whether it is wise for the average business man to attempt anything more than a grasp of the broad general conception of the subject which the authors of the smaller textbooks put before him.

For practitioners, on the other hand, Dr. Schmitthoff's book is unlikely to supersede *Chalmers* as a *vade mecum*, since it contains only a selection of the case material, though that selection is excellently made. In the absence of a really satisfactory students' textbook on this subject the present volume may well prove most useful in that quarter, at any rate for the time being; though, as Dr. Schmitthoff recognises, the form which he adopts, which is that of a commentary on the individual sections of the Sale of Goods Act, 1893, is not at all satisfactory for such a textbook. Indeed, his treatment of a number of important topics is quite inadequate from the point of view of the student, who in order to grasp the essentials of the rules set out in the text must be given an explanation of their origin and purport. A good example of this is the rule on market overt, which is accurately enough set out but which makes no sense whatever to a student unless he is made acquainted with its history. And why should there be an exception in cases where the thief is prosecuted to conviction? Here again a couple of sentences of history would show that once upon a time at any rate the exception had some sense in it. These lapses are the more difficult to understand because Dr. Schmitthoff provides an admirable short historical introduction to the whole subject which is a model of its kind.

To the reviewer the great virtues of the present work are the lucidity and accuracy of its exposition, and the excellent choice of illustrative case material. Dr. Schmitthoff has taken most of his case material from decisions given over the last twenty years and seldom goes back to the period before the passing of the Sale of Goods Act. This not only gives an impression of realism to his exposition, but makes evident the wealth of judicial reasoning which exists in the modern reports.

One of the most difficult of all the problems which has confronted the courts in connection with sale of goods cases has been the measurement of damage. Sir Mackenzie Chalmers' attempt to set out the rules shortly in some four sections of the Sale of Goods Act, 1893, was by no means successful, and judges have been at work ever since trying to elaborate a series of rules which will effectively order the matter. The result is a mass of difficult case law, the substance of which Dr. Schmitthoff sets out with admirable lucidity, and

if there is any part of his book to which lawyers may be advised to turn for help it is this. Except for a somewhat cursory treatment of the leading case of *Williams* v. *Agius* [1914] A.C. 510, his treatment of the subject could hardly be bettered.

As is natural in a first edition there are a substantial number of passages which need attention, and of printer's errors which need rectification when a second edition is called for, as doubtlessly it will in due course. At p. 58 it is stated that "the condition (which is of higher legal order than the warranty) includes a warranty, but not vice versa." A lawyer might perhaps cavil at this statement, but what is more important is that without much fuller explanation it is likely to be meaningless to a business man. At p. 59 it is stated that "implied conditions relating to quality and fitness are treated in ss. 13–15." Actually section 13 is concerned with the wider category of description, and not in any way restricted to quality or fitness. The discussion of "particular purpose" here does not allude to the difficulty of distinguishing "particular" from "general" purpose which has been discussed in some of the cases. Also, I think that the rather complicated problem of sample sales by description is best understood in the light of *Drummond* v. *Van Ingen* (1887) 12 App.Cas. 284; it is, of course, true that this case was decided before 1893, but Dr. Schmitthoff has not completely eschewed the use of the older cases, and occasionally there is no modern case which fits half so well as does one of the classics. At p. 96 it is stated that "in the nineteenth century it was thought that some dock warrants, warehousekeepers' certificates and delivery warrants or orders might be documents of title . . . but in modern mercantile practice the tendency is to deny this quality to them." The first part of this statement is not accurate as these documents were in fact held to be documents of title in the cases or by statutory definition, and the most that can be said about modern mercantile practice is that it tends to place less emphasis than formerly on this aspect of them.

Among the printer's errors which I have noticed are: p. 64, Aston J. (Acton); p. 67, *Re Wait* appears in the index as *ex parte Wait* (incidentally, this important case is worth much fuller treatment); p. 104, *Anderson Ry.* v. *Well Brothers* (should be Weil). Incidentally, I find the unusual use of the words "buyer" and "seller" without the "the" rather irritating, though this is purely a matter of taste.

C.

BENJAMIN ON SALE. Eighth Edition. By THE HON. SIR DONALD LESLIE FINNEMORE, one of Her Majesty's Judges of the Queen's Bench Division, Honorary Fellow of Pembroke College, Oxford, and ARTHUR E. JAMES, of the Middle Temple, Barrister-at-Law. [London: Sweet & Maxwell, Ltd. 1950. l and 1040 and (index) 51 pp. £5 10s. net.]

A NEW edition of *Benjamin on Sale* after an interval of nearly 20 years is indeed an occasion, and the task of reviewing such an honoured "classic" must be approached with all due respect and humility. The task is, however, made easier by the pleasing appearance of the volume, with its well-spaced paragraphs, the frequent subdivisions, and the attractive print and binding It can be said, too, at the outset that the present learned editors have fulfilled their exacting undertaking with a degree of success which merits our gratitude and admiration.

Yet it may perhaps be permitted to query the correctness of the general policy indicated by the first sentence in the preface to this new edition, where the learned editor-in-chief writes: "When I was invited in 1944 to prepare a new edition of *Benjamin* it was decided that no more changes than

necessary should be made, so as to retain as much as possible of the original book."

It must be remembered that it is now some 80 years since the second edition of this work, which was the last edition to be undertaken by the author himself; and that this second edition appeared in 1878, just 20 years before the Sale of Goods Act, 1893, which had for its aim the codification of this branch of the law—a codification which, it is generally agreed, has been very successfully achieved. The major difficulty which subsequent editors must have experienced is the incorporation of the Act into the original text, and it must be remarked that this task has still not been too happily accomplished in several chapters.

The main criticism must be that too much pre-1894 authority is being retained for its own sake, and not for one of the three legitimate functions of case-law in a subject which has been codified, namely, to illustrate the application of the codifying enactment, to fill the inevitable lacunæ—whether they arise, as it were, accidentally or under an express clause saving the operation of the common law, such as section 61 (2) of the Sale of Goods Act—and, lastly, in those instances where the statute has in fact modified the common law, to provide examples of that earlier law so as to enable the modifications more fully and more readily to be appreciated.

Reference in this connection might be made to the remarks of Sir H. H. Cozens-Hardy, as he then was, the Master of the Rolls, in the case of *Bristol Tramways* v. *Fiat* [1910] 2 K.B. 831, at p. 836: "The case really turns upon section 14 of the Sale of Goods Act, 1893. I rather deprecate the citation of earlier decisions such as *Chanter* v. *Hopkins* or *Shepherd* v. *Pybus*. The object and intent of the statute of 1893 was, no doubt, simply to codify the unwritten law applicable to the sale of goods, but in so far as there is an express statutory enactment, that alone must be looked at. . . ."

Or, as Sir Mackenzie Chalmers—the draftsman both of the Bills of Exchange Act, 1882, and of the Sale of Goods Act, 1893—states in his preface to the third edition of his *Digest of the Law of Bills of Exchange*: "The cases decided before the Act are only law in so far as they can be shown to be correct and logical deductions from the general propositions of the Act."

This dictum of the learned Master of the Rolls is not to be found in *Benjamin*, nor is any discussion as to the general relationship of the common law and the statute; and so we find the common law preserved as being equally important as an express statutory provision, as can be seen in the chapter on Remedies against the Goods—Resale, p. 935. After two pages of introduction, consisting almost entirely of pre-1894 decisions, with no indication of the effect of the Act on these decisions, we find this simple, yet significant, sentence: "It will be convenient to consider the seller's right of resale, first at common law, and then as enacted in the Sale of Goods Act." Seven pages are then devoted to the common law before 1894—still with no indication of whether any of this is still valid—and finally four pages discuss section 48 of the Act, which lays down the present law on this topic. It is submitted that the whole emphasis is misplaced, with a consequent loss of unity and clarity.

With a suitable selection from the same material, a much more logical and satisfying treatment could be achieved, by considering first and foremost section 48, and discussing whether or not it has modified the common law in any respect. If it has not, then examples of its operation could be given from both pre-1894 and post-1893 cases; if it has modified it, then pre-1894 cases could be called in aid to throw those modifications into relief; and then doubtful questions arising on the statute, or out of omissions from the statute, could be considered, again with the help, if necessary, of pre-1894 decisions.

Some space has been devoted to this matter, as it is felt that therein is to be found the reason for the criticism which is often levelled against *Benjamin*, namely, that the text is disjointed. It is appreciated that this course might

well involve the omission of more of the original work, but, after all, the words of the Master himself can always be found in the second edition—indeed, even now for some of our learned colleagues, *Benjamin* means the second edition.

To turn briefly to matters of more detail, the actual text in the chapter on Resale requires amendment in several places in view of *Gallagher* v. *Shilcock*, which is discussed at p. 945. Thus, the submission in Conclusion 8 on p. 951 that the contract is rescinded on a resale without any express power being reserved, can no longer stand, while the last paragraph on p. 947 similarly needs correction. The remark on p. 951 (footnote (s)), that no mention is made of notice in *Maclean* v. *Dunn*, is incorrect, as indeed is pointed out in the text at p. 937.

The discussion of the consequences of frustration, too, is unsatisfactory for a work of this magnitude. Thus, we are given, at p. 577, the facts of *Chandler* v. *Webster* (where the contract is not one for the sale of goods), and of the *Fibrosa Case*, and, on p. 578, an outline of the Law Reform (Frustrated Contracts) Act, 1943, in its application to contracts for the sale of goods, but it is only as a sidewind that we learn on p. 579 that the rule in *Chandler* v. *Webster* has never applied to sales of specific goods where the goods have perished before the risk has passed to the buyer, and that it has long been established that in such cases the buyer can recover any advance payment he may have made. In this respect, the main paragraph on p. 147 is most misleading.

In a different direction, it might be suggested that a Table of Statutes might be included, at any rate, of statutes other than the Sale of Goods Act itself, which appears in Appendix I with marginal notes indicating the pages at which the various sections are principally discussed. And, no doubt, consideration has been given to the desirability of giving all the references to a case in the Table of Cases, rather than in the footnotes every time the name of the case appears; perhaps the first main reference might be left in the footnotes, together with, of course, the date of the case. This would have the additional advantage of reducing the space occupied by the footnotes.

As for omissions of recent cases, the most striking would appear to be—apart from those already noted elsewhere—*Heay* v. *Godfrey* (1947) 80 Ll.L.R. 286 (on representations and warranties); *Mason* v. *Burningham* [1949] 2 K.B. 545 (on section 12 (2)) (this case is discussed on another point, and is wrongly given in the Table of Cases as *Mason* v. *Birmingham*); *Warman* v. *Southern Counties Finance Corporation* [1949] 2 K.B. 576 (on hire-purchase); *Mercantile Union* v. *Ball* [1937] 2 K.B. 498 (hire-purchase by infant); *Denny, Mott and Dickson* v. *Fraser* [1944] A.C. 265 (on frustration); *Mona Oil Co.* v. *Rhodesia Rys.* [1949] 2 All E.R. 1014 (prevention of performance).

The only reference to *Leafe* v. *International Galleries* is a footnote on p. 428, while the omission of any reference to such cases as *The Glenroy* [1945] A.C. 124 and *Comptoir d'Achat* v. *Luis de Ridder* [1949] A.C. 293 leads to the observation that the C.I.F. and F.O.B. forms of commercial contract are very inadequately examined in a work of this nature.

Of ordinary printers' errors there seem very few, but there are numerous trivial and unnecessary discrepancies between the names of cases as given in the text and footnotes and as given in the Table of Cases. If we are to be given the facts of *Aldridge* v. *Johnson* on p. 8, they might as well be the true facts as stated later on p. 888.

Such detailed criticism in individual topics must not, however, be allowed to detract from the soundness and value of the text as a whole. The edition can well take its place beside the earlier ones, countless practitioners will be happier now that they can once again refer to a recent *Benjamin*, and it is to be hoped that another 20 years will not be allowed to elapse before we are favoured with the next.

C. F. PARKER.

NATHAN'S EQUITY THROUGH THE CASES. Second Edition. By O. R. MARSHALL, M.A., PH.D., of the Inner Temple, Barrister-at-Law, Sub-Dean of the Faculty of Laws and Lecturer in Law at University College, London. [London: Stevens & Sons, Ltd. 1951. lx and 552 and (index) 6 pp. 85s. net.]

THE large volumes of J. W. Smith on Common Law, F. T. White and O. D. Tudor on Equity, and of the latter text writer on Real Property and Conveyancing may be regarded as the ancestors of the family of books of Leading Cases in English Law, and they were succeeded by a progeny of volumes on a slighter scale, such as Shirley on Common Law and Brett on Equity, all based on the leading case system, but whereas the major volumes set out the text of the judicial decisions, virtually *in extenso*, and appended thereto a copious commentary with a repertory of allied cases cited referentially, the minor volumes more or less summarised the judgments and annotated them in epitome. *Nathan's Equity Through the Cases* on its first appearance in 1939 broke new ground, setting out the judicial decisions on an ampler scale than the minor volumes envisaged, providing a pithy headnote afresh, together with a running commentary, less in the nature of an Index of similar cases than that of the major volumes, while sufficiently referential yet forming a compact presentation of the whole relevant law in relation to the subject of the case submitted as a leading judicial authority. The dust cover adds to the title "Equity Through the Cases" the apt phrase "and Judicial Exposition." The book differs from the usual type of "case book" in that each section is given a subject title to head the illustrative leading case and, as the Editor observes, in many places he has "been content to let the cases speak for themselves" without having "added some explanation," in other words the maxim *res ipsa loquitur* has been applied to the presentation of legal literature at the appropriate point. A typical instance of the method adopted is to be found by referring to the section on "Charitable Trusts," rearranged and expanded to include the most recent decisions to the date of completion of the work. It is, of course, an inherent difficulty in works of this kind that the law moves more rapidly than it can be easily overtaken, and the law relating to Charities has taken unto itself an appreciable set of additional cases since the material date. The Editor anticipated this in his Preface, where he refers to the possibility of amendment of the text consequential on the "Diplock" litigation reaching the Lords at the stage of publication, the case having only got as far as the Court of Appeal. Among the most valuable features of the work are the references to current text writers, both in the realm of books and of periodical literature. The expositions are not only readable but widely comprehensive, and have proved of valuable utility not only in the academic sphere but also in that of professional practice, the portability of the volume and the convenient format and presentation of the text all helping in that behalf. The term "Equity" is used mainly in relation to trusts, but cases include leading authorities such as *Reid* v. *Bickerstaff* [1907] 2 Ch. 305, and *Elliston* v. *Reacher* [1908] 2 Ch. 374, 665, in respect of restrictive covenants, usually considered in relation to Real Property Law and Conveyancing practice. No two persons are inclined to make the same selection of leading cases, and some of us may miss, here and there, a favourite "war horse" and be surprised to find another raised to the higher status. One misses, for instance, that old friend *Re Adams and the Kensington Vestry*, 27 Ch.D. 394, in respect of "Precatory Trusts", and, indeed, in this behalf *Re Atkinson*, 80 L.J.Ch. 370, merited citation where the earlier cases are reviewed. On the other hand the referential annotation is so widely extended that *Re Howard*, reported alone in *The Times* newspaper, October 30, 1908, finds place. One suggestion is offered for a future edition and that is the addition of a Table of Leading Cases to that of the General Table of Cases cited in the work

as a whole, or else the printing in larger type of the names of the former than that of the latter, making reference easier. *Nathan* is a book not only for the student's locker but also for the practitioner's handbag, for equipped with this *vade mecum* when away from an easily accessible library one has a *multum in parvo*, within its limits, which consultation at many points in practice has proved to be both reliable, making allowances for subsequent development, and remarkably elucidating. Dr. Marshall is to be congratulated on a fine piece of work, well worthy of the outstanding contribution which the original compiler added to the contemporary Law Library.

BERTRAM B. BENAS.

THE BRITISH PENAL SYSTEM 1778–1950. By R. S. E. HINDE, Chaplain and Senior Tutor, Hertford College, Oxford. [London: Duckworth & Co., Ltd. 1951. 255 pp. 10s. 6d.]

IN the course of the past 12 months there have been a number of books on penal administration in this country designed to gain, for the new methods in the combat against crime now coming to the fore, that support among the public at large without which they cannot fully develop or hope to bear fruit. Lord Templewood, Miss Margery Fry and the late Sir Alexander Paterson have already had the word, but Mr. Hinde's unpretentious volume, which appears in a series of "Social Science Studies," makes a further important contribution to the debate. It helps to get the present position into proper focus by approaching it from the purely historical angle and describes how it has come to be what it is.

It is perhaps the most striking fact which emerges from this scholarly survey of the painful and halting way in which our penal system has moved forward during the past two centuries that the reformative approach to criminal offenders is by no means as recent and "modern" as some might be inclined to suppose. Mr. Hinde, who has drawn extensively upon contemporary documents and has throughout left them to speak almost for themselves, shows that ever since the beginning of central government supervision of prisons in 1835 considerable emphasis has been laid on the need "to train the prisoner so as to fit him for successfully encountering the hardships and temptations to which he will be exposed on his return to society, thus reducing to its lowest point his danger of relapse into evil courses. Now the cardinal feature of this treatment is to place the fate of the prisoner in his own hands. . . ." The quotation dates from the year 1857.

It is on the means to achieve this end that opinions have differed so profoundly and it is this difference of opinion, not fully resolved yet, which is responsible for the lack, even today, of consistent enforcement of our criminal laws.

Solitary confinement has disappeared and so have purely repressive and punitive measures, but the stage has yet to be reached where courts, prison authorities and prison staffs, in deciding (after conviction) on the treatment of an offender and in its execution, are guided, within the limits prescribed by the law, by the prisoner's capacity and need for readjustment through training rather than by the gravity of the specific offence with which he was charged. Treadwheels, cranks and oakum picking have gone, and it is today almost universally recognised that reformation and readjustment is impossible without settled habits of sensible work; yet satisfactory employment and training in a useful trade or craft is exactly what many prisons, for reasons largely outside their control, cannot yet provide. As a result, not a few prisoners find themselves upon release little better prepared for a useful life in society than they were at the start.

Seen in long-term perspective, one of the most noteworthy achievements of the penal system in this country is the gradual removal of children and juveniles from the prisons and the setting up of other institutions better fitted to deal with them. The "drag of public opinion" has hampered progress in this field far less than in dealing with adult delinquents, and above all recidivists, but even Borstal comes in periodically for some of the criticism so freely levelled by poorly informed public opinion against all forms of open prisons. Mr. Hinde aptly quotes a statement made by Mr. Winston Churchill, as Home Secretary in 1910: "The mood and temper of the public with regard to the treatment of crime and criminals is one of the most unfailing tests of the civilisation of any country." This account, concise, objective and fully documented, shows that this country need not be ashamed of its record and that the spirit of John Howard and Elizabeth Fry is still alive today. To know this can be no ground for complacency, for much remains still to be done and the active support of public opinion is essential to the success of the present policy of training and rehabilitation.

H. A. HAMMELMANN.

THE JUSTICES' HANDBOOK. By J. P. EDDY, K.C. Second Edition by the Author. [London: Stevens & Sons, Ltd. 1951. xiv and 224 pp. (with index). 12s. 6d. net.]

WE reviewed the first edition of this book in 11 M.L.R. at p. 367, when we expressed the opinion that its chief virtue was the success with which Mr. Eddy had picked out the topics most likely to be useful to the average magistrate, and the practical way with which he dealt with them. We also made a few criticisms on matters of detail which we notice have not been attended to.

In this edition Mr. Eddy was faced with incorporating the major provisions of recent important statutes, particularly the Criminal Justice Act, 1948, and the Justices of the Peace Act, 1949. This was bound to test severely his policy of keeping his book short and succinct, and although he has struggled manfully, he has not altogether succeeded for the book has grown by nearly a third in length which is a disproportionate amount; and the price has increased by nearly 50 per cent. The work of incorporation has been well done, and the volume is still within a very reasonable compass, but if it grows at this rate in future editions its purpose will be largely defeated. Incidentally it should be noted that the work of Quarter Sessions is not dealt with.

C.

SECURITY, LOYALTY, AND SCIENCE. By WALTER GELLHORN. [Cornell University Press; London: Geoffrey Cumberlege. 1950. viii and 300 pp. (with index). English price, 24s. net.]

WHEN I received this book for review I had a feeling that so substantial a work on what seemed so limited a subject must contain a great deal of padding. I should have realised that a book by so eminent a lawyer as Professor Gellhorn would be a solid production, as indeed it has proved. For although there is some over-emphasis and repetition of the argument, the volume is a closely documented account of the provisions of the American law and procedure relating to the "securing" of atomic and other weapons, and the effect of these upon the life and liberties of American scientists. It is therefore concerned with aspects of civil liberty quite different from, though just as important as, those described in the textbooks on constitutional law.

The result is to intensify and concretise one's vague fears that all is not well on this front in the U.S.A. A great deal is, indeed, obviously very ill,

and no one reading these pages can escape the conclusion that the American people are in grave danger of losing the cold war. It is obviously impossible for fundamental scientific research to go on in such an atmosphere, and subject to the control of bureaucrats terrorised by politicians many of whom are stupid and dishonest, and others of whom are demoralised and panic stricken, and all of whom are subject to the blind hysteria of a lumpen proletariat which they themselves have worked up into such a state of fear and bewilderment that it has become incapable of either judgment or decency of conduct. We, in this country, have had some experience of loyalty tests, and of offences against the Official Secrets Act, but our situation compared with that existing in the U.S.A. gives no cause for real worry, unless, of course, the Americans infect us with their own virus.

Fortunately the battle is not lost. There are still many men in the U.S.A. of eminence, judgment and courage who have kept their heads. It is gratifying to find that so many of these are leading lawyers, judges in the superior federal courts, teachers in the great American law schools. Indeed, the fact that the close investigation of the whole problem which this book describes should have been made possible by a grant from the Rockefeller Foundation, and that the volume itself should have been published by a great American university are themselves sources of encouragement.

C.

LA CRISE DE L'ÉTAT AUX ÉTATS-UNIS. By ROGER PINTO. [Paris: Librairie Générale de Droit et de Jurisprudence. 1951. 248 pp.]

THIS is an acute and penetrating study of recent constitutional and political developments in the U.S.A. by one of the professors in the law faculty at Lille. His thesis is that without the American people knowing it the executive has acquired the dominant power in the State, has in large measure established a collective or at any rate a controlled economy, has turned the State administrations into something little more than federal agencies, and has tamed the Supreme Court so that it has ceased to be a political arbiter, and has become a mere protector of the liberties of the individual. This thesis is worked out in some detail and with considerable ingenuity.

C.

CASES ON PRIVATE INTERNATIONAL LAW. By J. H. C. MORRIS, D.C.L. Second Edition. [Oxford: University Press. 1951. xxvii and 417 pp. 30s. net.]

THIS book is of such outstanding quality that even those teachers of law who dislike case-books will wish to encourage students to use it as on many occasions it will make recourse to the last edition of *Dicey* unnecessary and on others will help students to appreciate the gist of the more lengthy treatment in the textbooks. In this edition the number of cases reported has been considerably increased, they have been arranged so as to cover the subject more fully and in a more logical order. But the attraction of the book derives not so much from the cases, however carefully selected and edited, as from the explanatory Notes. They present a concise, yet comprehensive and balanced survey of the topics under which the cases have been grouped. However brief, they are not written on an elementary level. They do not conceal or suppress the difficulties and uncertainties which indeed attract and stimulate interest in the Conflict of Laws. On the contrary, the Notes are particularly concerned with those matters which are the subject of

controversy. The account given of even the most intricate problems is always lucid, even if not invariably convincing or quite fair to those with whom Dr. Morris does not agree.

The spirit of controversy is shown in the selection of the unorthodox judgment of Denning L.J. in *Boissevain* v. *Weil* as one of those to be included in the cases on Contracts. As the House of Lords did not adopt the view that English law was the proper law of the contract in this case, the decision illustrates no more than that it is impossible to contract out of the stringent rules of public policy (*ordre public international*) of the *lex fori*. It seems, therefore, rather overconfident to say that the reaction against the subjective theory has been judicially inaugurated by Denning L.J.

Again, the case of the advocates of double classification is not stated very fairly. That one of them has abandoned this theory and that the others cannot always agree where to draw the line between primary and secondary classification is hardly an argument. This theory might seem less unattractive if it were pointed that it is concerned to show that, *e.g.*, the question whether a polygamous union is a marriage (in the sense of the English Conflict of Laws) is essentially different from the question whether art. 148 c.c. is part of the French law of capacity to marry.

The arguments raised against *Re Bischoffsheim* do not seem very convincing. The first criticism (on p 172) only tends to show that the court was misinformed when told that under the law of New York R. W. was considered legitimate at birth, it does not affect the reasoning of Romer J. which proceeded on the factual assumption that this evidence was correct.

When discussing immovables (on p. 266), Dr. Morris explains the concession there made to *renvoi* in terms of the principle of effectiveness which is, to say the least, a weak foundation for any choice of law rule since, if carried to its logical conclusion, it undermines the whole system of Private International Law. Why should it be assumed that Spanish officials will refuse to aid those whose title to Spanish land has been established in an English court in accordance with the English rules of Conflict of Laws? Once the *renvoi* is rejected, in connection with the *lex situs* as on other occasions, it is no longer necessary to feel apologetic about the application of English domestic law to English land. This could easily be reconciled with Cook's contention that only that part of the *lex situs* should be applied which forms part of its land law (a question of secondary classification) and that, as Dr. Morris suggests, the *lex domicilii* should be applied in relation to capacity.

This review is perhaps not the place to discuss these controversies which Dr. Morris is here concerned to report rather than to initiate. A few minor points might, however, be raised. On p. 98, *Risk* v. *Risk* should be cited as it lends support to the view that the validity of a polygamous marriage can be tested as a matter of matrimonial capacity, although the solution suggested by Denning L.J. in *Kenward* v. *Kenward* seems more reasonable. On p. 105, *Wall* v. *Wall* is discussed without any indication that this decision has now been replaced by section 18 (2) of the Matrimonial Causes Act, 1950, with some not unimportant changes, such as requiring residence *for three years*. On p. 175, *Re Askew* is cited as supporting the view that section 1 (2) of the Legitimacy Act, 1926, is only a rule of English domestic law. But this case seems merely to establish that section 1 (2) will not apply to legitimations which do not take effect under the Act. It remains open to argue that the subsection will apply to legitimations under the statutory choice of law rules. On p. 209, Dr. Morris suggests that the case of *P. & O. S.S. Co.* v. *Shand* supports the presumption in favour of the *lex loci solutionis* rather than the *lex loci contractus*, and, to prove this, he assumes two alternative changes in the facts of the case. It is interesting that a similar situation is considered by Dr. Wolff, on p. 488 of his *Private International Law* (2nd ed.) (In Dr. Wolff's example the ship is owned by a *French* company.) Dr. Wolff shows that in the case of standard contracts there is much to be said in favour of the law of the place

where the company carries on its business and this seems preferable to Dr. Morris' choice of the *lex loci solutionis*. On p. 829, Dr. Morris asserts rather too dogmatically that there is no reason for having different choice of law rules for capacity to enter into mercantile or marriage settlement contracts. Yet the two types of transaction have very little in common. The case for the same choice of law rule on capacity to make a marriage settlement contract and on capacity to marry is at least as strong as that for uniform choice of law rules on capacity to enter into mercantile and marriage settlement contracts. When dealing with the authorities on this subject, Dr. Morris repeats in even more emphatic terms his criticism of *Re Cooke's Trusts* and exclaims (on p. 831) that "by no stretch of the imagination could such a (marriage settlement) contract have restricted . . . testamentary capacity." But is it inconceivable that restrictions on testamentary capacity should attach only to those who by contracting out of a régime of community of goods have acquired the ability to dispose of their property away from the family? If that should have been the position under French law it becomes clear that the children's claim to compulsory portions depended upon the validity of the marriage settlement contract.

The author of any case-book as fully annotated as the present would inevitably be asked to enlarge his work into a textbook. But it would be unreasonable to address this request to the General Editor of *Dicey*. One may, however, hope that, in the next edition, he will provide notes on those few subjects which are left without them even if this should finally establish that this book is more than a companion volume to other textbooks.

J. UNGER.

BEITRAEGE ZUM HAAGER INTERNATIONALPRIVATRECHT 1951. By MAX GUTZWILLER and WERNER NIEDERER. [Fribourg, Switzerland: Universitätsbuchhandlung. 1951. ix and 190 pp. No price stated.]

IN the course of last year the movement for the unification of private international law was carried a step forward by a seventh Hague Conference. Its programme was discussed in September, 1950, by the meeting of the Swiss Association for international law. There were submitted to it reports by Professor Gutzwiller of the University of Fribourg on Sales and Goods and by Professor Niederer of the University of Zurich on Corporations. These reports have now been published in a volume which will be found extraordinarily valuable.

It opens with Professor Gutzwiller's report mainly devoted to the three fundamental problems which the Convention will have to solve: which is the law prima facie applicable to *a vente internationale*? should the parties be at liberty to determine the proper law? to what extent are matters relating to the mode of performance subject to a separate legal system? The second and third of these questions are further developed by an excursus; another excursus deals with the delimitation of the proposed Convention's applicability. In a supplemental part the *travaux préparatoires* are printed. The author gives an illuminating survey of the present position of the movement and makes many helpful suggestions for leading it to a point where it may result in a generally acceptable Convention. His remarks on the proper law of the contract are of particular interest. He rightly concludes (pp. 42, 43) that the problem of the autonomy of the parties "must today be deemed to be clarified in all its essential aspects"

The structure of Professor Niederer's report is similar. The main report, amplified by an excursus and the reproduction of antecedent material, discusses the question whether a corporation is subject to the law of the place of incorporation or to the law of the country where it has its seat.

This is a problem which continues to occupy lawyers on the Continent, although English lawyers cannot help asking themselves how the control of the law of the place of incorporation can possibly be open to doubt. It is satisfactory to note that this is the legal system which Professor Niederer decidedly favours and which, according to him, represents the prevailing view in Switzerland. It will not be easy to eliminate the fascination which the seat-theory exercises over Continental lawyers' minds, but Professor Niederer's convincing analysis will, it is hoped, bring the day of its burial much nearer.

The care with which Switzerland has prepared the seventh Hague Conference deserves praise and admiration. If such difficulties as stand in the way of a Convention prove to be surmountable, a major share in the success will have to be attributed to the work done by two of the leading lawyers of Switzerland.

F. A. MANN.

ADMINISTRATIVE AGENCIES AND THE COURTS. By FRANK E. COOPER, of the Detroit Bar, Visiting Professor of Law, University of Michigan Law School. [Ann Arbor: Michigan University Press; London: Geoffrey Cumberlege. 1951. XXV and 470 pp. 40s. net.]

THE books on American administrative law that are available in this country fall into three main groups. There are the valuable general surveys made by Pound, Landis, Schwartz and others. There are the specialised works on individual administrative agencies; these attract the attention of the student of public administration rather than the lawyer. Finally, there are the case-books. At least six of these massive works have been published in recent years. To read through any of them is a salutary experience for any English public lawyer who tends to feel complacent about his own work. But he puts them down with a sense of bewilderment as well as of humility; they are comprehensive but not always fully comprehensible source-books, interspersed with brilliant editorial heckling which presupposes more background knowledge than the reader overseas is likely to have at his command. What he really wants is a book that gives a detailed and consecutive exposition of the main principles that govern the relationship between the courts and the administration. Professor Cooper has written such a book, and it deserves to be read by all who are interested in this subject. It is of a manageable size; it is admirably arranged; it is written in a lucid and lively style. If the author says little that has not been said elsewhere by others, he has at least succeeded in distilling the essence of a vast number of leading cases and law review articles without overloading the text with citations. That the courts are often motivated by considerations of public policy in determining the standards to which administrative action must conform is freely admitted, and the relevant factors are carefully analysed. This is a most illuminating and readable book, and the author is to be congratulated on his achievement.

S. A. DE SMITH.

ABSTRACT OF LEGAL PRELIMINARIES TO MARRIAGE IN THE UNITED KINGDOM AND THE OTHER COUNTRIES OF THE BRITISH COMMONWEALTH OF NATIONS, AND IN THE IRISH REPUBLIC. By the General Register Office. [London: H.M.S.O. 1951. v and 189 pp. 6s.]

THE officials of the General Register Office, of the Commonwealth Relations Office and of the Colonial Office who with the help of the Dominion and

Colonial Governments and of the Irish Government, collected the vast volume of information summarised in these pages were no doubt pursuing a practical objective: they were catering for the needs of their own officers who must be continuously confronted with problems arising from the diversity of the hundreds of marriage laws existing in the British Commonwealth. This compilation will greatly assist them in solving their problems, but at the same time it is a godsend for the student of comparative law. In it he will find references to the statutes and ordinances governing the law of marriage in each territory, and a summary of the legal rules themselves in so far as they regulate preliminaries (banns, licences, etc.), age of marriage, prohibited degrees, consent to the marriage of a minor, residential qualifications, the persons by whom and the times and places at which marriages may be solemnised, and of the fees payable by the parties. Broadly speaking, the Abstract covers the same ground as the Marriage Act, 1949. It does not give a full conspectus of the laws governing the formal or essential validity of marriage. Thus, while it deals with the publication of banns, it gives no information as regards the ceremony itself, or matters such as the absence of a previous marriage, mental or physical health, mistake or duress. Nor does it set out the legal consequences of non-compliance with those requirements it summarises, so that, *e.g.*, it does not appear from the survey that the marriage of a person under 16 is void under English law, while the lack of parental consent to the marriage of a person between 16 and 21 does not affect the validity of the marriage. From the point of view of those for whose benefit this Abstract was primarily written, all requirements are equal in value, they must all be observed, irrespective of the consequences of non-observance. For the lawyer, however, the distinction between *impedimenta dirimentia* and *impedimenta impedientia* is vital. Yet, in guiding him to the legislative material, the Abstract will enable him to collect even such information as it does not itself supply. What emerges from this Abstract is an appalling lack of uniformity in approach towards fundamental problems of marriage law even as between the common law jurisdictions of the British Empire. There are vast differences in a comparatively simple matter such as the requisite minimum age between the various States of Australia and the common law Provinces of Canada. If any attempt at unification should ever be made, this book will be useful in undertaking it. It will also stimulate thought on law reform in this country. Thus it is submitted that the Province of Manitoba which prohibits marriage by persons under 16 but permits them where "necessary to prevent illegitimacy of offspring" is more humane and more realistic than those countries (like England and Scotland) which do not provide for such an exception. Points of this kind constantly occur to the reader of this work. All those who co-operated in its preparation, and especially the editor, Mr. E. C. Davies of the Registrar General's office, deserve the gratitude of the legal profession.

O. KAHN-FREUND.

ISRAEL'S ARMISTICE AGREEMENTS WITH THE ARAB STATES. A Juridical Interpretation. By SHABTAI ROSENNE. [Tel-Aviv: Blumstein's Bookstalls. 98 pp.]

MR. Shabtai Rosenne is the legal adviser to the Israel Ministry of Foreign Affairs; and he had a leading part in the negotiations and the drafting of the Armistice Agreements, made in 1949 between Israel and four Arab States: Egypt, Lebanon, Hashemite Kingdom of Jordan and Syria. The States are placed in the chronological order in which the agreements were made. This pamphlet is an amplification of a lecture which he gave to the Israel Branch of the International Law Association; and he shows convincingly that the Armistice Agreements are international documents which

are interesting not only from the historical but from the International Law point of view. As one would expect, his study is fully documented, and the author has prefaced the legal analysis of the Agreements by a chapter which gives clearly and concisely the historical background

In the first place he distinguishes between the terms Truce and Armistice. "The truce is essentially cast in the form of a negative commandment. Thou shalt not." The Armistice may contain positive injunctions duly undertaken. It is an essential character of the four Armistice Agreements that they contain far-reaching transitional provisions to cover the period between the actual ending of hostilities and the formal restoration of peace. So they were intended at the time when they were negotiated to be "preliminaries of peace." Unhappily, in the three years that have passed, the project has not been implemented. The second difference between truce and armistice is that, while the former is a matter for the belligerents alone, the outside world, in this case represented by the United Nations, is deeply concerned with the armistices. The agreements are subordinate to the obligations, contained in the Charter of the United Nations, to refrain from the threat of use of force, and to settle international disputes by peaceful means.

Mr. Rosenne analyses closely the relation of the agreements to Article 40 of the Charter which prescribes provisional measures that may be imposed by the Security Council to prevent aggravation of a situation. It was a guiding principle of Article 40 of the Charter and the Armistice Agreements that "the provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned." The application of this principle was that neither party should gain a military or political advantage Yet, as the commentator remarks: "Nothing that the United Nations could do could overcome the teaching of Heraclitus that everything is in a state of flux." And inevitably the relations of the parties have been changed during the term of the Armistice Agreements. Last year indeed the Security Council was occupied for some months with a dispute between Israel and Syria over a question of drainage works, which the Israel Government was carrying out in a demilitarised frontier area, the Hulch Marshes in Northern Galilee. Syria objected that the change of the character of the marshes would affect the military position; while Israel claimed that they were performing works of a civilian nature for the purpose of reclaiming land for cultivation The work affected land under Israel's control, and Syria was not entitled to object In the end, that dispute, like many others, was settled by the adjudication of the Chief-of-Staff of the United Nations.

It is again a remarkable feature of these Armistice Agreements that each of them provides for the appointment of a Mixed Armistice Commission, composed of an equal number of representatives appointed by each party and a chairman, who is either the United Nations Chief-of-Staff or a senior officer from among the United Nations observers designated by him Decisions of these commissions are based on the principle of unanimity, but at the same time may be made by a majority vote of the members present and voting. As Mr. Rosenne remarks: "This was a polite way of saying that in disputed matters the decision would in fact rest with the United Nations' chairman." The Commissions, in fact, are constantly called upon to deal with disputes; and one or two of them, like the Security Council itself, are in almost continuous session. They may be compared indeed with the Security Council in miniature. And their efficiency has been due to two factors. First, the States have been sincere in using them as machinery to overcome their difficulties; and secondly, the Security Council of the United Nations has interfered as little as possible, and done nothing to undermine their authority.

Moreover, the Mixed Armistice Commissions have been for these three years a meeting place for Jews and Arabs at which day-to-day matters can be discussed under the United Nations auspices. The Chief-of-Staff,

reporting in 1950 to the Secretary-General of the United Nations, said: "The Mixed Armistice Commission have been able to settle and to alleviate innumerable human problems arising between the parties on a local level, and generally to contribute to growing human understanding between peoples who, but a year ago, were involved in a bitter and sanguinary conflict." In this respect the Commissions are contrasted with the Palestine Conciliation Commission, also appointed by the United Nations with a view to bring about peace between Israel and the Arab States. The Israel and Arab delegations to the Commission have never been in direct contact, but have carried on their intercourse through the post-office, as it were, of the Commission, and with poor results.

In his concluding chapter Mr. Rosenne argues that, taken in the context of the Charter of the United Nations, the Armistice Agreements had the consequence of removing any belligerent rights between the parties, whose relations thereafter were to be governed by the agreements and the provisions of the United Nations Charter. That was the point of discussion before the Security Council in the summer of 1951, concerning the Egyptian maintenance of the blockade of the Suez Canal, and the general blockade practices by the Egyptians against any shipping or goods with an Israel destination. The Egyptian claim that the Armistice Agreements did not put an end to the state of war, and therefore they were entitled to maintain their belligerent rights, was rejected by the Council. Moreover, all the agreements contain a non-aggression clause, which reinforces the obligation of non-aggression under the Charter.

Finally, Mr. Rosenne urges that the achievement of the Security Council in helping to bring about the Armistice Agreements places on it an obligation to continue to use its influence to secure permanent peace between Israel and the Arab States. The pamphlet ends with a warm tribute to Dr. Bunche, Mediator of the United Nations and the successor of Count Bernadotte, who single-handed, as the representative of the United Nations, brought the contending States to agreement. His outstanding success in the Armistice negotiations gives a measure of the regret that he was not maintained in the role of peace-maker. Perhaps it is not too late for the authorities of the United Nations to turn to him again for a fresh effort to bring Israel and the Arab States together round the table once more, and to transform the Armistice Agreements, in accordance with the original intention, into peace settlements.

NORMAN BENTWICH.

RUSSIA AND THE UNITED STATES. By PITRIM A. SOROKIN. Second Edition. Published under the Auspices of the London Institute of World Affairs. [London: Stevens. 1950. 209 pp. (index). 12s. 6d.]

FIRST published in 1944 in the United States, this book still bears the marks of the period in which it was written, when the Soviet Union and the United States were Allies in a common struggle, and when it was assumed that the Bolshevist ideology was being slowly modified and losing its sharpness. Professor Sorokin's theme is the "essential sociocultural similarity and congeniality" between the two countries to which he attributes their "unique record of peace and co-operation." He proceeds to illustrate this similarity by a comparative analysis of American and Russian society and institutions. However, one feels that in attempting to prove too much, the author ends only by demonstrating that Russians and Americans possess common human qualities.

In the approach to the comparative study of nations, there are perhaps two dangers; either to stress the human individual qualities which are possessed in common by most peoples and therefore to assume that their

political outlook and behaviour is similar, or treat peoples as possessing fixed, and unchanging characters. Professor Sorokin seems to fall into the first category in asserting that there are no fundamental differences between the two peoples, but rather significant similarities. He buttresses his thesis by selective analysis of Russian history and very questionable analogies between Russian and American institutions. In the field of institutions he exaggerates the influence and power of the Boyarskala Duma and the Zemsky Sobor. Both continued to exist during the Muscovite period but they can hardly be said to have exerted any effective check on the absolute authority of the Tsar. Some of his statements in this context are so vague as to lose any meaning. Thus he says that "the Muscovy Tsarist régime was as democratic as virtually any contemporary European monarchial régime" (p. 62) Nor can one agree with his assertion that from 1906 onwards "Russia became legally as well as in fact, a constitutional monarchy—more truly constitutional than for instance Germany or Austria" (p. 62). In 1906 Nicholas II declared that the supreme autocratic power still belonged to the All Russian Emperor. During this period there was no effective ministerial responsibility, and there was no constitutional or actual compulsion on the Tsar to appoint a government responsible even to the unrepresentative Duma of 1912 If any analogy can be made, the Russian constitution of 1906–1919 is comparable to the Prussian constitution of 1851 which could hardly be defined as a constitutional monarchy When he claims that with "a slight exaggeration one may say that the banishment and imprisonment of political offenders (under the imperial régime) was more in the nature of granting them a vacation with most of the expenses paid" (p. 100), his description verges on the ridiculous. Similarly, some of his remarks regarding the Soviet Union are open to considerable criticism For example, it is surely an overstatement, to say the least, to write that "at the time of Hitler's invasion, Russia had returned to her normal standards of morality and decency of respect for human and divine laws and values," and that "the post-war restrictions on freedom are solely the result of the cold war" (p 90).

His analysis of the responsibility for the "cold war" is somewhat one-sided. "Causally and objectively," he writes, "the initiators of the Truman doctrine, of a coercive universal containment of Communism, of a gigantic rearmament, of the Atlantic Pact, of a new 'cordon sanitaire' (p. 181), backed up with atom bombs that have caused the revival of totalitarianism in the East." The establishment of a Communist-dominated régime in Poland, and the intervention in Rumania preceded the policies he refers to. The Communist coup in Czechoslovakia occurred before the Atlantic Pact, so did the conflict with Yugoslavia. It was the Western Powers who substantially demobilised their armies and drastically reduced their military strength, while the Soviet army has been maintained at a high level. As for the "cordon sanitaire" it is the Soviet Union which prevents the free exchange of people and ideas between Western and Eastern Europe, and has refused to join most of the international co-operative agencies of the United Nations and has recently resigned from the few which it had joined.

As to the "unique record" of peace and co-operation between Russia and the United States, one can only remark that up to 1917 the United States had only fought two wars with major Powers. The absence of war was due to the position of the United States on the periphery of world politics rather than to the essential similarity and congeniality of the two peoples.

These exaggerations are unfortunate since they detract from the value of many of Professor Sorokin's observations. His suggestion that one of the main reasons for the tension between the U.S.A. and the Soviet Union is that they have emerged from the Second World War as the two greatest Powers, and that even if the Russian régime had been different tension would still have existed, is a welcome corrective to the concentration on the ideological issue.

IEUAN G. JOHN.

HANDBOOK ON TRADE MARKS LAWS THROUGHOUT THE WORLD. By P. O. HEREWARD B.A., Barrister-at-Law. [London: Sweet & Maxwell. 1951. 210 pp. 30s.]

SINCE 1946, when Haddan's *Compendium on Trade Marks* was no longer kept up to date, British practitioners concerned with foreign trade mark law had to resort to the American work on *Trade Marks Laws of the World* by White and Ravenscroft. Mr. Hereward now gives us a most useful new British book on the subject. Country by country it contains all information needed by trade mark agents, lawyers and industrialists who want to file, renew or protect a trade mark abroad. Mr. Hereward has collected for all civilised countries of the world the provisions of their trade mark law and practice dealing with the Documents required for an Application for a Trade Mark, Powers of Attorney, Office Procedure, Opposition (if any), International Conventions, Maintenance and Renewals. For some countries, though not for others, he gives the Classification of Goods and the Provisions for Infringement Proceedings. Last, but not least, he deals with the question of Assignment and Licensing of Trade Marks. None of the existing older handbooks on foreign trade marks broached the question of licences under trade marks which has become of great practical importance to British exporters of branded goods of world-wide repute. Mr. Hereward evidently has been in touch with trade marks experts in many countries in order to obtain first hand authentic information on the problem of licences under trade marks, which will prove most helpful to British and foreign readers of his book. British law provides quite clearly that the grant of a licence invalidates a trade mark unless it is granted to a "Registered User" entered on the Register in accordance with the provisions of the Trade Marks Act, 1938. Under the U.S. Trade Mark Law of 1946 use of an American trade mark by a "related company" is permissible without the cumbersome formalities of the British law. In other countries, for example, France, licences under trade marks are permissible without restriction.

Mr Hereward states that the rights of Western Germany under the International Convention are suspended at the moment; according to a notice in the *Official Journal* (*Patents*) of April 26, 1951, the Convention did, however, apply again between the United Kingdom and Western Germany. Apart from this and a few printing errors in the text of Austrian and German powers of attorney, the only criticism to be levelled against Mr. Hereward's book is the failure to produce it in loose-leaf form. Within a short period the law and practice of trade marks will obviously change in many of the 180 countries covered by Mr. Hereward's work, and the bound volume is therefore in danger of becoming obsolete all too quickly.

P. MEINHARDT.

DIE RECHTSLEHRE VOM VERTRAUEN. PRIVATRECHTLICHE UNTERSUCHUNGEN ÜBER DEN SCHUTZ DES VERTRAUENS. By DR. HERMANN EICHLER, Professor of Law at the Academy for Economic and Social Sciences, Nuremberg. [Tübingen: J. C. B. Mohr (Paul Siebeck). 1950. xv and 128 pp.]

MANY rules of the law of contract are designed to protect a party which relies on a promise made by the other party or on a custom and habit which raises the expectation that the other party would do or refrain from doing certain acts. This is a very old truth. Grotius knew it already when he referred to the "duty of keeping faith" as one of the three chief duties owed by one man to another and explained that it is one of the moral

duties which the law of obligations is designed to protect. It is, however, equally true that lawyers have not rarely been charged with overlooking this aspect of the theory of contract. Bentham has claimed that the word "expectation" is scarcely found in the vocabulary of the legal profession. Yet he had to admit that the lawyers "have followed it, without doubt, in many respects," though he blamed them for having done so "by instinct rather than by reason." He concludes that "if they had known its extreme importance they would not have failed to name it and to mark it, instead of leaving it unnoticed in the crowd." Dr. Eichler in the present book raises a similar charge against German lawyers, but—differing in this respect from Bentham—he tries to remedy the defect himself instead of clamouring that others should remedy it. Some of his considerations are no doubt worthy of approval: that the rule of good faith requires some better elaboration than the German courts and German doctrine have given it in the past is true, and that the notion of reliance may be an instrument to be employed in this task can be readily admitted. But his painstaking examination of a host of individual institutions and rules of German law has shown that a great deal has been done in the past by legislators and courts for the protection of reliance, and that by no means all of it was done "by instinct rather than by reason." Had the author extended the field of his research into legal history and comparative law (and in particular the common law system), he would perhaps have been inclined to doubt whether there was really a great deal of need for a fresh "doctrine of reliance." The present reviewer at least ventures to think that—apart from the light shed on the principle of good faith—there is little new ground broken in this study.

E. J. Cohn.

THE ELEMENTS OF INCOME TAX LAW. By C. N. BEATTIE, LL.B., Barrister-at-Law. [London: Stevens & Sons, Ltd. 1951. xxv and 180 and (index) 10 pp.]

THIS work, written primarily for the law student, meets a long felt need since most elementary books on income tax are written from the accountancy or practical angle. Mr. Beattie has deliberately eschewed the mathematics of income tax and has concentrated upon the law and principles behind the figures. He has particularly borne in mind the problems which the budding lawyer, not accountant, will have to meet in actual practice. As a result the space devoted to the liability of businesses, which occupies a major part of most textbooks, is severely restricted by comparison with other topics such as income from property, liability of husband and wife, the winding up of estates, trusts and settlements, residence and the like.

The work opens with short introduction explanatory of the Income Tax Acts and their administration followed by an excellent exposition of the general scheme of the tax—"deduction (or collection) of tax at the source" Then follow chapters upon Personal Reliefs, Income from Land, Profits of a Trade, Employments and a particularly valuable chapter (7) "Income arising under Wills, Intestacies and Settlements." A miscellany of matters —interest, annuities, casual profits, patents and copyrights—are then dealt with, followed by chapters on Companies, etc, Surtax, the "Foreign Element" and Appeals, etc. For the size of the work the index is excellent and the Table of Cases adequate; it is bound to be a matter of individual preference in a book of this size which of the 2,000 odd tax cases are included or excluded.

Criticism of detail is rather out of place in a review of so short a book and a few minor and unimportant errors will doubtless be corrected in the second edition which can be looked for in the near future. It does, however,

seem to your reviewer that Chapter 8, which deals with the general law relating to interest, annuities, etc, should have preceded Chapter 7, "Income arising under Wills, etc.," especially as "Tax-Free Annuities" are dealt with at some length in this chapter.

The book can be thoroughly recommended to the law student and a knowledge of its contents should make the scoring of good marks in the Income Tax part of the Law Society's Final Examination easy. From July 1952 this work is the prescribed book for this examination, a fact which itself bespeaks the value of Mr. Beattie's labours.

A. FARNSWORTH.

RENT RESTRICTIONS. By ESTHER DANGERFIELD, Barrister-at-Law. "This is the Law" Series. [London: Stevens & Sons, Ltd. 1951. 180 pp. 8s. 6d.]

OF all the subjects so far included in this series, the present is perhaps the most difficult. To reduce the law of rent restrictions to simple language and some 180 pages without allowing the exposition to become obscure or dangerously oversimplified is a task which few would gladly undertake. The present book, which has a preface by Mr. R. E. Megarry and owes something to his work, demonstrates that the task is not impossible. The treatment is as full as could reasonably be expected and the text is clear and leads no-one into a false sense of security. For the primary class of users, ordinary landlords and tenants, it is an excellent guide, not only as to rights but also to dangers, and it wisely expressly warns that those intent on litigation should seek expert advice. One other class of user will certainly welcome it, the student for whom the Rent Restriction Acts and their satellites form a dreadful spectre. As an introduction to the subject this book can do much to calm their fears and make the task of digesting practitioners' works considerably lighter.

J. D. B. MITCHELL.

THE NATIONALISED INDUSTRIES. Revised Second Edition. By D. N. CHESTER, C.B.E., Fellow of Nuffield College, Oxford. [London: George Allen & Unwin, Ltd. 1951. 98 pp. 7s. 6d.]

THE contents of this useful little book, published for the Institute of Public Administration, are best described in the words of its sub-title "An Analysis of the Statutory Provisions." After a brief introduction, tracing the genesis of the various measures of nationalisation and the general tendencies which they display, it analyses the statutory provisions relating to the public corporations, both pre- and post-war, under six heads:—Constitution, Area Boards and Executives, Advisory and Consumers Councils, Ministerial Control, Finance, Accounts and Audit, Annual Reports, and Labour Relations. The treatment relates mainly to what are generally designated the Commercial Corporations (but including the B.B.C.) as opposed to the social service corporations (such as the Central Land Board, and the Regional Hospital Boards). The book ends with a Select Bibliography, which, however, is mainly limited to separate publications as opposed to articles in periodicals other than those in the Journal, *Public Administration*: for example, it does not mention Prof. Friedmann's article in Vol. 10 of this Review.

The book should prove most valuable to anyone who wants to compare the provisions applying to the various corporations without wading through the voluminous Statutes, and the arrangement should enable him to find

what he wants with comparative ease—although the absence of an index will be regretted. It would have been still more useful, at any rate to the lawyer, had the numbers of the appropriate sections been quoted.

L. C. B. G.

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THE
MODERN LAW REVIEW

Volume 15 October 1952 No. 4

JUDICIAL REVIEW OF EXPULSION BY A DOMESTIC TRIBUNAL

THE increasing tendency in the modern State to organise the conditions under which a person may enter into and pursue a particular profession or occupation has resulted in great powers being vested in the controlling bodies. These powers may extend not only to the imposition of penalties by way of fines for breach of the rules laid down but even to expulsion resulting in the deprivation of a man's livelihood. In some cases the controlling body is created by statute and its jurisdiction will then necessarily depend upon its statutory powers. More often, however, the body in question will be a purely voluntary organisation whose powers will rest solely upon the agreement, express or implied, of the members. Accordingly, where questions arise as to what powers such a body possesses, whether they have been properly exercised, in what circumstances the court will intervene, and, in the event of such intervention, what remedies are to be granted to an aggrieved member, recourse is had to those general branches of law comprised under the headings of contract, property and tort. Unfortunately, those well-known categories seem to lack the necessary degree of flexibility for dealing with this sort of situation, so that it must often happen that a person who is unjustly expelled from his profession or occupation is left entirely without legal remedy. It is true that so far as this country is concerned, this class of problem has not often been before the courts, but this may well be due to the ineffectualness of the legal remedies and the inevitable tendency, clearly apparent throughout the whole range of labour relations and collective bargaining, to regulate such disputes by domestic and private arrangements without resorting to the courts. It has recently been decided that in any event no recourse to the courts may be had until all the domestic remedies under the rules have been exhausted (*White* v. *Kuzych* [1951] 2 All E.R. 435),[1] and in those rare cases where litigation ensues the result is not usually satisfactory to the aggrieved plaintiff.

In a previous article in this review[2] an attempt was made to

1 See, on this case, article by Prof. Whitmore in (1952) 80 C.B.R., pp. 1 *et seq.*
2 "Disciplinary Powers of Professional Bodies," in (1950) 13 M.L.R., pp. 281 *et seq.*

argue that though some of the reported cases (especially the earlier ones) had tended to stress that the intervention of the court could only be based on an interference with the member's right of property, the trend of some of the later decisions has been in the direction of recognising that such intervention could also be based upon the infringement of a contractual right, and that in most instances the society's rules would constitute the terms of the contract between the aggrieved members and the other members, a breach of which would warrant judicial intervention. It was further suggested that, although contract provided a much more satisfactory basis for judicial review than property, it still remained an insufficiently flexible category to produce an adequate solution in many cases, and that while an action in tort might be found more appropriate for this purpose there was little prospect of the judicial extension of tortious liability to meet the situation. Further light has since been thrown on all these matters by two important recent decisions of the Court of Appeal,[3] and it is proposed in this article to examine these decisions in some detail in an endeavour to elucidate the stage of development which has now been reached in this increasingly important legal field.

In the earlier of these two cases[4] the plaintiff was a corn porter employed in the London Docks, and a member of a committee formed to protect the interests of corn porters. This committee apparently possessed no written constitution whatever but it wielded *de facto* jurisdiction over corn porters, and it exercised control by the infliction of fines and by its power to remove a corn porter from a register kept by the committee. The effect of such removal was that the person in question could not act as a corn porter in the Port of London. Complaints were made against the plaintiff by certain members of the gang of porters under his charge, and he was summoned to attend a meeting of the committee. The meeting was convened by one Platt, an officer of the men's trade union with which the committee worked in close association. At the meeting, which Platt attended in an advisory capacity, the plaintiff was fined. Immediately after the meeting the plaintiff followed Platt into the street and struck him. Platt thereupon convened an emergency meeting of the committee at which it was resolved that the plaintiff's name should be removed from the register. The plaintiff brought an action against (*inter alios*) two members of the committee and Platt. He alleged that the resolution passed at the emergency meeting was invalid, and claimed a declaration to that effect and also an injunction restraining the defendants from acting upon the resolution; he also claimed against

[3] *Abbott* v. *Sullivan* [1952] 1 All E.R 226; *Lee* v. *Showmen's Guild of Great Britain* [1952] 1 All E.R. 1175.
[4] *Abbott* v *Sullivan*, *ut supra*.

the committee members[5] damages for wrongfully removing his name from the register and against Platt for wrongfully procuring his removal.

The trial judge held that the resolution was *ultra vires* and invalid but declined to grant an injunction. He further held that no damages could be awarded as the defendants did not act maliciously, and he "could not see any legal peg on which to hang" such an award. The plaintiff appealed, and before the appeal was heard his name was, in fact, restored to the register. On the appeal, therefore, the only substantial issue was the question of damages. It was held by Sir Raymond Evershed M.R. and Morris L.J. (Denning L.J. dissenting) that no damages were recoverable.

The Master of the Rolls pointed out that both the powers of the committee and the rights of the plaintiff-member must depend in law on the existence of some express or implied contract made between each and every corn porter and every member of the committee. Thus, in a case such as this, where the plaintiff sought to recover damages he would have to establish an implied contractual term, *e.g.*, to the effect that a corn porter would not be excluded save for the breach of a specific rule, or, perhaps, to the effect that the committee, having knowledge of the material facts, would not act in excess of its contractual jurisdiction. Unfortunately, however, the case was apparently—notwithstanding the "long and much amended statement of claim"—not pleaded in this way, and one may indeed feel some sympathy with the learned pleader seeking to make his way through what Denning L.J. described as an "uncharted area on the borderland of contract and of tort" (p. 285). From the point of view of the clarification of this obscure branch of law the particular misfortune is, that it is difficult to say how much the case really decides and how far it turned on a question of pleading. Sir Raymond Evershed M.R. did, however, indicate that he was not satisfied that any such implied term could be inferred, and that he doubted whether there was any real analogy with the club cases, though he refrained from expressing a final view.

Morris L.J. (in whose judgment the Master of the Rolls concurred) also thought that the claim for damages must be founded upon a contract express or implied. There was no suggestion of an express contract, and it was "hardly appropriate that an appellate court should be left to grope for implied terms when none have been specified" (p. 240). Further, apart from the question of pleading, the learned Lord Justice was of opinion that the facts as proved did not warrant the conclusion that any such implied term could be inferred. On the possible existence of liability in tort,

[5] It is clear that damages could not have been recovered from the association itself, even if it were a society, such as a registered trade union, which could be sued in its collective name (*Kelly* v. *N.S.O.P.A.* (1915) 113 L.T. 1055)

Morris L.J. held that even if the categories of tort are not closed, there seemed no basis for framing a claim for mere wrongful expulsion in tort, though the position might be different if there was evidence of malice or of a conspiracy to injure.

In his dissenting judgment, holding that the claim to damages had been made out, Denning L.J. rejected the argument for tortious liability in the absence of proof of conspiracy. The learned Lord Justice referred to the oft-quoted statement that it is an actionable wrong intentionally to injure another without just cause or excuse (*e.g.*, *per* Bowen L.J. in *Mogul S.S.* v. *McGregor Gow*, 23 Q.B.D. at p. 613), but thought that such a broad proposition had not yet been accepted into our law. Denning L.J., however, was of opinion that the claim could be founded on contract, and he saw an analogy with the cases dealing with statutory tribunals wherein it had been held that if such a tribunal acted in excess of its jurisdiction, when it ought to have known on the facts before it that it had no such jurisdiction, then it might be liable in damages for injury inflicted upon the plaintiff. By analogy a tribunal whose jurisdiction is merely contractual should be subject to an implied term similar in effect to the limitation thus imposed on statutory tribunals.[6] Denning L.J. also thought that in a complex case of this sort it was enough if the pleader stated the facts sufficiently to enable the court to say what was the implied term which the law would annex to the contract.[7] In this instance he thought the facts as pleaded and proved established that there had been a breach of an implied contractual term and that, accordingly, an inquiry as to damages should be ordered.

If an attempt may be made to summarise the effect of this part of the case, it would seem that there was substantial agreement between all the members of the Court of Appeal. As regards *tort*, all three Lords Justices were of opinion that a mere wrongful expulsion from a voluntary organisation did not give rise to tortious liability.[8] The element of conspiracy might give rise to such liability, but this is because a conspiracy to injure is now recognised as a tort in its own right. It is also suggested by Morris L.J. that if the expulsion was made maliciously, liability might result in tort. This would certainly be a useful advance in the legal protection of

[6] The difficulty here seems to be that the cases relied upon by Denning L.J. do not appear to treat the actual excess of jurisdiction as *in itself* a substantive wrong, but merely decide that if the tribunal orders something to be done which would be a tort unless executed in pursuance of an order of the tribunal, the tribunal may be liable in damages *for that tort*, if its jurisdiction is exceeded in circumstances where the excess of jurisdiction ought to have been apparent.

[7] But as against this, it might be urged that the contract and/or its precise terms are themselves *facts* which ought to be pleaded.

[8] Although no explanation is given by the court, it is submitted that the reason lies in the lack of any duty (apart from a contractual duty) owed to the plaintiff. Nor is this one of those exceptional cases where the court will treat a breach of contract as giving rise to a concurrent liability in tort. (*Cf.* (1950) 13 M.L.R., pp. 294–301.)

an expelled member, but it must be observed that to allow such a cause of action would be contrary to the normal principle in tort that an act which is not in itself unlawful is not rendered unlawful by a malicious or improper motive (*e.g.*, *Allen* v. *Flood* [1898] A.C. 1; *Mayor of Bradford* v. *Pickles* [1895] A.C. 587). There are, of course, exceptions to this principle, of which the law of conspiracy is itself one of the most conspicuous, and some support for the view of Morris L.J. may also be found in the proposition of Bowen L.J. in the *Mogul S.S. Case* referred to above. On the other hand, it may be said that the act of removal of the member can only be wrongful as a breach of contract, and that a mere breach of contract, however malicious, is not in itself a tort.

As regards liability in *contract*, despite differences as to whether the contract or its terms were adequately pleaded, and as to whether the facts in this particular case warranted the inference of an implied term, all three members of the court were apparently unanimous that breach of contract did afford a legal basis upon which a claim for damages could be formulated in a case of wrongful expulsion, and it may be suggested that where removal from a register clearly involves exclusion from the pursuit of a remunerative occupation there seems no reason why those damages should not be substantial. The case does, however, abundantly illustrate the extreme difficulty in such cases of formulating the claim in a manner that will stand up to legal scrutiny, since not only does a precise agreement between identifiable persons have to be set forth supported by a specific valuable consideration, but also the exact terms of the agreement, and, in particular, the implied term or terms in breach of which the expulsion is alleged to have taken place, have to be pleaded. And the more skilfully such terms are drafted for presentation to the court the more apt the court is to say that, however appropriate or desirable they may be, it is quite unable to accept them as *necessary* terms on the basis of which the parties must be held to have contracted.

There remain one or two further matters raised in the above case which are deserving of brief comment. The basis of the court's jurisdiction to intervene does not seem to have been much discussed in the case itself. As has been already pointed out, the earlier doctrine that the court would only assume jurisdiction where there was a wrongful interference with a right of property, has tended to give way in favour of treating breach of contract as the true basis of judicial review. Thus it has long been recognised that where the members pay a subscription then, even though they retain no beneficial interest in the funds of the association, the court would be ready to intervene to restrain a wrongful expulsion (see *per* Fletcher Moulton L.J. in *Osborne* v. *A.S.R.S.* [1911] 1 Ch. at p. 562). In the present case it would appear from the observations of Morris, L.J., who alone referred to this issue, that jurisdiction could be based on this principle enunciated by Fletcher

Moulton L.J. Unfortunately, however, no facts are given in the present report to indicate what, if any, subscriptions were payable, though Denning L.J. does point out that the corn porters' committee had no property (at p. 286).

It is also worthy of note that all three Lords Justices apparently agreed that the trial judge was justified in declaring the resolution of the committee invalid. Although the language of *ultra vires* is used, this appears to mean no more than that the resolution was not warranted by and therefore contrary to the contractual relationship of the parties. And while the payment of a subscription might suffice to give the court jurisdiction to make a declaration such as was made here[9] the court could hardly declare an act to have been invalid (apart from tort or illegality) save on the basis that it conflicted with some contractual rule or undertaking. It would therefore seem that when the learned Master of the Rolls states (at p. 229) that the onus was on the committee to show some contractual foundation for their alleged jurisdiction to pass the resolution, and this they had failed to establish, the power of the court to make the necessary declaration proceeds on the basis that there was *a contract* between the defendant committee members and the plaintiff, and that the resolution complained of constituted a breach of that contract. As to the jurisdiction to grant an injunction, this point had become academic since the plaintiff had in fact been restored to the register, though Denning L.J. did point out that though such a remedy was not usually available to enforce personal relations,[10] save where a right of property was involved, an injunction might have gone if the defendants had insisted in not restoring the plaintiff's name to the register.

The trial judge also held that there had been a failure of natural justice, in that when the plaintiff was summoned to the second meeting of the committee he was not told that any charge was being made against him. Sir Raymond Evershed M.R. (who alone referred to this point), while declining to express a concluded view, did not dissent from this finding, though he went on to emphasise that the plaintiff was in fact well aware of the nature of the charge and the purpose for which the meeting was summoned. On this it may perhaps be said that while the cases have never insisted on any particular form of notification, it seems hardly adequate that the accused member should be left to guess what is to be alleged against him even though his guess may well turn out to be correct.

The allegation against Platt for wrongfully procuring a breach of contract obviously fell to the ground in the absence of proof of an appropriate contract, but in any event the majority of the

[9] See, *e.g.*, *Donaldson* v. *Institute of Botano-Therapy* (1937) 184 L.T.J. 884.

[10] *Quaere*, whether the right of a corn porter to remain on a register, removal from which will debar him from employment, can properly be described as a personal relationship?

court were clearly of opinion that there was no evidence of "procuring." Denning L.J., on the other hand, thought that Platt had induced the breach of contract by advising the committee to proceed. The line between advice and inducement is necessarily a very shadowy one, and the conflict of opinion here was not as to the governing principle but as to the correct inference to be drawn from the facts.

If the case of *Abbott* v. *Sullivan* serves mainly to emphasise the obstacles which face the expelled member in seeking relief from the ordinary courts, the subsequent decision in *Lee* v. *Showmen's Guild of Great Britain* ([1952] 1 All E.R. 1175) might seem at first sight at any rate to strike new ground in enlarging what was hitherto regarded as the ambit of the court's jurisdiction to intervene in an expulsion case. It is therefore necessary to examine the reasoning of the Lords Justices who decided that case with some care.

The facts of the case were comparatively simple. Both the plaintiff and one Shaw were members of the defendant guild (which was a registered trade union). By a previous ruling of the guild Shaw had been allotted a particular position on a certain fair ground. Later both Shaw and the plaintiff applied to the local authority for a site on the ground, and the local authority allotted the position claimed by Shaw under the guild's previous ruling, to the plaintiff. The plaintiff thereupon insisted upon occupying this site. Shaw complained to the committee of the guild. Under the rules of the guild no member was to indulge in "unfair competition," and there was also power under the rules to fine a member for a breach, and on non-payment of the fine to expel him from the guild. The committee having heard the complaint found the plaintiff guilty of "unfair competition" and fined him. The plaintiff refused to pay the fine, whereupon he was expelled. There was no allegation on the usual lines of any failure to observe the rules of natural justice, the main point being whether the plaintiff had been guilty of "unfair competition" within the meaning of the rules. For the guild it was argued that, provided the committee had acted in good faith, it was not open to the court to investigate the rightness of this decision. Both Ormerod J. and the Court of Appeal rejected this contention and held that the plaintiff's conduct could not amount to "unfair competition" within the meaning of the rule, and that the decision of the committee was *ultra vires* and void.

Somervell L.J., in his judgment, examined various conflicting dicta in some of the earlier cases,[11] and expressed a preference for the view that the court would interfere, not only on being satisfied that the committee had not acted honestly, but also, if there was

[11] *Leeson* v. *G.O M.E.* (1889) 43 Ch.D. 366; *Allinson* v. *G.C.M.E.* [1894] 1 Q.B. 750; *Maclean* v. *Workers' Union* [1929] 1 Ch. 602. (*Cf.* (1950) 13 M.L.R., at p. 284).

no evidence on which they could have reasonably reached their finding. Further, the learned Lord Justice was of opinion that if the committee have reached a finding without any evidence upon which they could so find, the court is not precluded from interfering, although the committee may have honestly misconstrued the rules under which they were purporting to act. Somervell L.J., having reached the conclusion that there was no evidence in this case to support the committee's finding, held that this was sufficient to entitle the plaintiffs to the relief claimed, but concluded his judgment with the following words:—

> "This is a difficult and important branch of the law. I am alive, I hope, to the important and necessary work done by domestic tribunals normally with care, skill and fairness. I am also alive to the principle reiterated more than once that this court cannot be made a court of appeal from decisions of such tribunals. On the other hand, a power of expelling a member is a drastic power which in many cases, as here, may affect the plaintiff's livelihood, or reputation. There is, in my opinion, a distinction between cases where the decision challenged is under the rules based on the opinion of a committee on a matter which is primarily one of opinion, and those cases, such as the present, where the decision is, or should be, based primarily on the legal construction of words in a rule. The principles laid down in the former class of case are sufficient for the plaintiff here. I wish, however, to make it clear that, in my opinion, the principles laid down in those cases are not necessarily to be regarded as setting the limit to the jurisdiction of this court where the issue is one primarily of construction."

Denning L.J. began his judgment by affirming that the jurisdiction of a domestic (non-statutory [12]) tribunal is founded on contract, express or implied. The rules of the association contain the contract between the members, and are as much subject to the jurisdiction of the courts as any other contract. Denning L.J. rejected the test referred to in some of the older cases [13] which bases the jurisdiction on a right of property, and thought that proprietary rights were only relevant in cases where the right of the member would otherwise be too personal (*e.g.*, in the case of a member's right to enter a social club) to be specifically enforced. The relevance of rights of property thus went to the form of the remedy, not to the right itself.

The jurisdiction of a domestic tribunal, however, is subject to limitations imposed by public policy. Thus, natural justice must

[12] The main difference in the case of a statutory tribunal is the existence of the remedy of certiorari. That remedy is available in the case of an error of law, but only where it appears on the face of the record (see *R. v. Northumberland Compensation Tribunal* [1952] 1 All E.R. 122). Denning L.J. suggests that this limitation would not apply where the remedy sought was an injunction and declaration even in the case of a statutory tribunal (see [1952] 1 All E.R., at p. 1183)

[13] *e.g.*, *per* Jessel, M.R., in *Rigby v. Connol* (1880) 14 Ch.D., at p. 487.

be observed and cannot be excluded by agreement.[14] Moreover, the jurisdiction of the courts cannot be ousted, so that, though the tribunal can by agreement be made the final arbiter on questions of fact, its decisions on points of law cannot be excluded from review by the courts.

Resort may therefore always be had to the ordinary courts when the decision of the domestic tribunal turns on a point of law. The so-called "club-cases" are here of little assistance, as the only issue for determination in such cases has been whether the member has been guilty of conduct detrimental to the club, and this is a matter of opinion and nothing else. "It is very different with domestic tribunals which sit in judgment on the members of a trade or profession. They wield powers as great, if not greater, than any exercised by the courts of law. They can deprive a man of his livelihood. They can ban him from the trade in which he has spent his life and which is the only trade he knows. They are usually empowered to do this for any breach of their rules, which, be it noted, are rules which they impose and which he has no real opportunity of accepting or rejecting. In theory their powers are based on contract. The man is supposed to have contracted to give them these great powers, but in practice he has no choice in the matter. If he is to engage in the trade, he has to submit to the rules promulgated by the committee. Is such a tribunal to be treated by these courts on the same footing as a social club? I say: 'No.' A man's right to work is just as important, if not more important, to him than his rights of property. These courts intervene every day to protect rights of property. They must also intervene to protect the right to work."

The true construction of the rules then is a matter of law, and this is to be decided in the last resort by the courts, whose jurisdiction cannot be excluded. It is not enough for the committee to act honestly if they have acted on a misconstruction of the rules. The rules are the contract between the members and the committee cannot extend their jurisdiction by giving a wrong interpretation to the contract, however honest they may be. In some cases it will be possible to distinguish clearly between the construction of the rules and their application, only the former being a question of law. Where, however, as must often happen, these two matters are inextricably mixed together, the question for consideration will be whether the facts as adduced before the tribunal were reasonably capable of being held to be a breach of the rules. The proposition that the court can interfere if there was no evidence to support the finding only means that the facts were not reasonably capable of supporting the finding.

[14] *Cf.* the similar view expressed by Denning L.J. in *Russell* v. *Duke of Norfolk* [1949] 1 All E.R., at p. 119 (some conflicting dicta on this point are collected in (1950) 13 M.L.R., at pp. 302–3).

Romer L.J. also emphasised the contractual nature of the member's right to remain a member unless and until he forfeited that right by conduct which, under the rules, would justify his expulsion. "In general, this right to continued membership of a trade union is of vital importance to men who join it, and expulsion from the union may well result in the loss to a man of his only known means of livelihood. It is a right which the courts recognise and will not hesitate, in proper circumstances, to protect."

In the view of the learned Lord Justice, the facts before the committee in the present dispute being virtually uncontested, the inquiry involved was wholly a question of law, *viz.*, whether these facts amounted to "unfair competition" within the meaning of the rule. Further, although the rules required the member to accept as binding the decisions of the tribunal, this must not be taken to extend to decisions on matters of law, including the construction of the rules themselves. The club-cases were distinguishable on the ground that the test of expulsion in such cases was merely a matter of opinion, and that the courts would not intervene to investigate questions which were matters of ethics rather than of law.

Finally, Romer L.J. turned to consider whether, had there been vested in the committee a final and exclusive power of interpreting the rules, a member would be debarred from resorting to the courts if the committee adopted a palpably erroneous construction. Without expressing a concluded view, Romer L.J. was of opinion that the same considerations of public policy would apply here as in other attempts to oust the jurisdiction of the courts. "The proper tribunals for the determination of legal disputes in this country are the courts, and they are the only tribunals which, by training and experience, and assisted by properly qualified advocates, are fitted for the task. The courts jealously uphold and safeguard the prima facie privilege of every man to resort to them for the determination and enforcement of his legal rights."

All the Lords Justices being of opinion that the facts adduced could not amount to "unfair competition" within the meaning of the rules, the decision of Ormerod J., that the committee had acted *ultra vires*, and that the expulsion of the plaintiff was void, was unanimously upheld.

It is submitted that this important decision, although it undoubtedly strikes new ground, in no way involves a reversal of the previous trend of decisions and, indeed, is fully in line with the more recent developments in this branch of law. As previously pointed out, the current trend has been to move away from the older view that jurisdiction in these matters is to be based on the right of property, and to found the jurisdiction squarely on the breach of a contractual duty owed to the member. Since the contract of the member with his fellow members or with

the association itself[15] is normally embodied in the rules of the association there seems no reason in principle why these rules should not be the subject of scrutiny by the ordinary courts just as in the case of any other contract. Moreover, the court has always insisted that in considering whether a member has been lawfully expelled it is necessary that there should have been strict compliance with the rules,[16] and it is difficult to see why any distinction should be drawn here between rules which are merely procedural and those which are of a substantive character.

In the club-cases, as in the case of statutory tribunals, the courts have insisted on the application of the rules of natural justice in a case of expulsion as an overriding principle, and it therefore seems to follow logically that the parties should not be allowed to contract out of these rules which the courts regard as fundamental. The error has been to assume that, because the court has hitherto intervened on this basis, and at the same time emphasised that it will not sit as a court of appeal from a domestic tribunal, it will never intervene on any other ground. It has several times been asserted in earlier cases that the court will not reverse the tribunal's decision on a finding of misconduct simply because it disagrees with it, but that it will set it aside if there is no evidence by which it can be supported.[17] And now that the contractual basis of the jurisdiction is at last fully acknowledged it seems equally to follow that the construction of the contract must be a matter of law which cannot, in the absence at any rate of clear words to the contrary, be within the exclusive discretion of one party to the contract.

As to the effect of an express clause excluding the jurisdiction of the courts on matters of law or construction, the general attitude of the courts seems to be hostile towards the exclusion of their jurisdiction, save where a statute so provides in plain terms. This attitude is sufficiently illustrated by the refusal of the courts to allow an arbitrator to have the last word on matters of law, even with the express consent of the parties.[18] No doubt there is much to be said for this view in the case of a notional contract, such as that derived from the rules governing a member's relations with his trade union or professional organisation, since there is really little or no genuine consensus on the part of the member in such a case. There is, perhaps, more to be said for the parties being able to make their own contract, including the mode in which it is to be construed, when they are contracting on a basis of genuine equality.

[15] *i.e.*, if the association is a corporation, or is of a quasi corporate character, as in the case of a registered trade union.

[16] *Cf. per* Lord Denman in *Innes* v. *Wylie*, 1 C. & K., at p. 264

[17] See *Osgood* v. *Nelson* (1872) L.R. 5 H.L., at pp. 650, 654; *Allinson* v. *G.C.M.E.* [1894] 1 Q.B., at pp. 761, 763; *Thompson* v *B.M.A.* [1924] A.C., at p. 778.

[18] *Czarnikow* v *Roth, Schmidt & Co.* [1922] 2 K.B. 478. See also *Re Wynn* [1952] 1 All E.R. 841, for a more generalised application of this doctrine, criticised in (1952) 68 L.Q.R., at p. 157. See also p 497, *post*.

The decision in *Lee* v. *Showmen's Guild* thus affords, it is respectfully suggested, a welcome recognition of the contractual basis of the court's jurisdiction to review the finding of a domestic tribunal, and the implication therefrom that the contract is a matter for construction by the court in the same manner as any other contract. The fact, however, that this appears to be the first reported decision where the validity of an expulsion could be said to turn directly on the construction of the rules should serve to emphasise that it is only in the exceptional instance that the basis of this decision will afford a remedy. In the normal case the finding of a tribunal on an issue of misconduct will remain essentially one of fact and opinion, matters which *Lee's Case* does nothing to suggest the court will not still regard as primarily subjective and within the exclusive province of the tribunal. Further, *Abbott* v. *Sullivan* sufficiently exposes the difficulty of seeking to rely upon any implied term laying down the conditions upon which the tribunal is to exercise its jurisdiction. At the same time the power of the court to say there was no evidence upon which the finding could have been reached, does afford a useful reserve principle which has often been invoked in other spheres with salutary results.[19]

If a final word by way of conclusion may be permitted, *Lee's Case* emphasises the advantages inherent in the recognition of contract rather than property as the basis of the jurisdiction, while on the other hand *Abbott* v. *Sullivan* indicates that the category of contract is itself an inadequate instrument for the solution of many of the problems in this increasingly important legal territory. Of the acknowledged legal categories it would seem that only the law of tort could furnish the necessary machinery to make the supervision of the courts fully effective,[20] but that branch of law, despite the views of those who contend that it enshrines a general principle of liability for unjustifiable harm, has in this respect proved an insufficiently flexible instrument to meet the new social and economic conditions of our time.

DENNIS LLOYD.[21]

[*Inasmuch as the validity of the High Court of Parliament Act is still to be determined by the Appellate Division of the Supreme Court of South Africa, publication of the second part of Professor D. V. Cowen's article, "Legislature and Judiciary: Reflections on the Constitutional Issues in South Africa," will be deferred so that consideration may be given to the judgment of the court.*]

[19] *e.g.*, in appeals from the county courts, as to which see *Cumming* v. *Danson* [1942] 2 All E.R. 653; *Selwyn* v. *Hamill* [1948] 1 All E.R. 70.

[20] For American developments in this direction, see Prof. Z. Chafee in (1930) 43 Harv L.R. 993. and Prof. Clyde Summers in (1951) 64 Harv.L.R. 1049.

[21] Reader in English Law in the University of London.

CONDITIONS, WARRANTIES AND DESCRIPTIONS OF QUALITY IN SALE OF GOODS—I

1. INTRODUCTORY. Where a seller delivers defective goods, two questions immediately arise: what is the precise legal basis of his liability, and what rights has the buyer against him. Although these questions appear quite simple, the answers to them are difficult enough. Taking a broad preliminary view, the existing law may, somewhat paradoxically, be criticised as follows: (1) it has too much theory, (2) it has not enough theory, and (3) it has no theory whatever. There is too much theory because of the over-elaborate legal symbolism of "conditions," "warranties," "sale by description," "sale of specific goods" and so on. There is, on the other hand, too little theory because certain concepts, not being properly defined, have been allowed to fluctuate. There is, finally, no theory at all, because had there been a general or basic theory the existing complications and contradictions could never have arisen. In this paper I shall attempt to clarify the law. For this purpose I shall analyse the main legal principles and concepts and (where necessary) retrace their historical career.

2. THE WARRANTY. It is with the warranty that we must begin.[1] For the warranty, properly understood, explains almost the whole range and scope of the seller's duties with regard to the quality of the goods. And it is only through an analysis of the warranty that we can best understand the confusing (because interfering) development of certain other important concepts such as "*caveat emptor*" (including its exceptions), the "condition," and "sale by description." Indeed, it can be truly said that without a grasp of the law of warranty, the central aspects of the law of sale of goods cannot really be mastered.[2]

[1] The best expositions of the law of warranty are those by Professor Williston, and I have learned most from him; see especially, 1 *Williston on Sales* (2nd ed., 1948), hereafter referred to as Williston, *Sales*, §§ 178–226; 4 *Williston and Thompson on Contracts* (2nd ed., 1936), hereafter Williston, *Contracts*, §§ 968–978, and 5 Williston, *Contracts*, §§ 1461–1462. For references to Professor Williston's several important articles, see notes, *infra*. See also, Burdick, "Conditions and Warranties" (1900) 1 Columbia L.R. 71; Prosser, "The Implied Warranty of Merchantable Quality" (1943) 21 Can.B.R. 446 *et seq.* (reprinted from (1943) 27 Minnesota L.R. 117 *et seq.*). For a broader view of the subject: K. N. Llewellyn, "On Warranty of Quality, and Society" (1936) 36 Col L.R. 699; (1937) 37 Col.L.R. 341; Bogert and Fink, "Business Practice Regarding Warranties in Sale of Goods" (1930) 25 Illinois L.R. 400; Morrow, "Warranty of Quality: A Comparative Study" (1940) 14 Tulane L.R. 327, 527; Rabel, "The Nature of Warranty of Quality" (1950) 24 Tulane L.R. 278.

[2] As Professor Llewellyn has said, "[the warranty of quality] presents the sweep of sales law in perhaps its most dramatic form" *Cases and Materials on the Law of Sales* (1930) 204.

How then, to begin with, is the warranty to be defined?[3] According to section 62 (1) of the Sale of Goods Act, 1893, it is "an *agreement* with reference to the goods which are the subject of a contract of sale but *collateral* to the main purpose of such contract, the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated."[4]

This definition, we are told,[5] was adopted by the draftsman "after much consideration," and, moreover, its main purpose was to bring out "the distinction between a condition precedent and a collateral undertaking or promise." Something will later[6] be said about this alleged distinction; for the present we are mainly concerned with the extremely misleading terms "agreement" and "collateral."[7]

Let us begin with the vital word "agreement." At first sight it would seem that, according to the statutory definition, a warranty is some sort of special, separate contract referring to the quality of the goods and ancillary to the "main purpose" of the contract of sale, which purpose is simply the transfer of title.[8] But it is also clear that it cannot be a special or separate contract in a strict sense of those words, because of the rule of law that no fresh consideration is required for such a contract,[9] provided the warranty is not made *after* the contract of sale.[10] It follows that the warranty is just one undertaking or promise in the bundle of promises which a seller must perform in consideration of the buyer's promise to pay the price.[11]

This, however, is not all. For the draftsman also tells us[12] that "a representation may amount to a warranty." But what exactly did the draftsman mean? If a warranty is defined as an "agreement" (and, indeed, as some special or "collateral" agreement),

[3] "There is no more troublesome word in the law than the word 'warranty'," 1 Williston, *Sales*, § 181.

[4] The italics are mine. It will be noticed that the latter part of the statutory definition states only the *effect* of breach of warranty and does not elucidate the first part of the definition. For the American definition of warranty, see § 10, *infra*.

[5] Chalmers, *Sale of Goods* (12th ed., 1945), 224.

[6] See *infra*, § 10. See also §§ 8, 4, *infra*.

[7] In connection with all this, Professor Williston has said: "This is something which the English law and the English lawyer has never been willing or able to define entirely," 1 Williston, *Sales*, § 182.

[8] In s. 1 of the Act the contract of sale is defined as the transfer of the property for the price But if the transfer of property is, *by definition*, the main purpose of a contract of sale, do not the implied undertakings as to title in s. 12 become redundant?

[9] Chalmers, *op. cit.*, 46

[10] In such a case the warranty is a "supplemental" contract, Chalmers, *op. cit.*, 46.

[11] The bundle of promises may, rather scholastically, be enumerated as follows: (1) promise to *deliver* the goods; (2) promise to give *title* to the goods; (3) promise to deliver the right *quality* of the goods; (4) promise to deliver the right *quantity* of the goods; and (5) promise to deliver the goods at the right *time*.

[12] Chalmers, *op. cit.*, 46–47

how can a *representation* amount to a warranty as well? For needless to say, "representation" and "agreement" are different legal concepts, the former giving rise, if at all, to a tortious and the latter to a contractual liability.

The simple truth of the matter is that a warranty may be both a promise and a representation.[13] Its dual nature, however, became obscured by a rather complicated historical development. Although the warranty started out as an agreement strictly so called,[14] requiring special words for its creation,[15] an entirely new chapter began in the eighteenth century. It was then first established by Holt C.J.,[16] that a vendor's statement as to title would be an actionable warranty even though it was not made in special words or was made without knowledge that it was actually false.[17] Thus arose a novel type of warranty, *i.e.*, the warranty implied in fact, and its practical importance lay in this: (1) it extended the contractual liability of the express warranty by making unnecessary special words of undertaking and (2) it also created (what we now would regard as) a purely tortious liability where the seller had made affirmations or representations as to title which induced the buyer to buy. This development proceeded the more easily since the appropriate form of action for breach of warranty was the action of deceit. But in the latter part of the eighteenth century, breach of warranty began to be declared in assumpsit[18] until, eventually, the warranty was "transferred almost bodily into the domain of contract."[19] Whilst, as a result of this procedural development, the strictly contractual aspect of the warranty was very properly brought into relief, its delictual nature became very blurred.[20]

[13] *Cf.* Williston, "Representations and Warranties" (1918) 27 Harvard L.R. 1; "Liability for Honest Misrepresentation" (1911) 24 Harvard L.R. 415.

[14] It began as a covenant real in the early land law: see S. J. Bailey, "Warranties of Land in the Thirteenth Century" (1944) 8 Cambridge L.J. 274; (1945) 9 Cambridge L.J. 89, 192.

[15] *Chandelor* v. *Lopus* (1603) Cro.Jac. 4. This case makes it quite clear that such words as "*warrantizando vendidit*," etc., were then always necessary to create an express warranty. The case is fully discussed (and defended) from the point of view of the law of pleading in (1887) 1 Harvard L.R. 191; see also Hamilton, "The Ancient Maxim of Caveat Emptor" (1931) 40 Yale L.J. 1133, at 1166–9; but see 1 Williston, *Sales*, § 195, n. 6.

[16] Lord Holt's decisions were *Cross* v. *Gardner* (1689) 1 Show. 68; *ibid.*, Carthew 90; 3 Mod. 261; *Medina* v. *Stoughton* (1700) 1 Ld.Raym. 593; 1 Salk. 210. "How far these decisions advanced beyond the earlier law is not perfectly clear . . . but Lord Holt at least made clear what was doubtful before," 1 Williston, *Sales*, § 196, n. 7; see also Williston, "What Constitutes an Express Warranty" (1908) 21 Harvard L.R. 555, at 556.

[17] If the seller knowingly made a misstatement, deceit would of course, lie. See Selwyn, *Nisi Prius* (1820) vol. 1, 640 *et seq.*

[18] *Stuart* v. *Wilkins* (1778) 1 Doug. 18 is the first reported case. But the practice of declaring in assumpsit seems somewhat older; see *ibid.*, Buller J. at 21. See also *Jones* v. *Bright* (1829) 5 Bing. 533; 8 Holdsworth, *History of English Law*, 67–70. The warranty preceded assumpsit by almost a century, see Ames, "History of Assumpsit" (1888) 2 Harvard L.R. 1.

[19] Street, *Foundations of Legal Liability*, vol. 1, 390.

[20] It must be noticed that the implied-by-law warranty of title was not established until the middle of the nineteenth century (*cf. Morley* v *Attenborough* (1849) 3 Exch. 500), after the law had already evolved the implied-by-law

There is another point. Chalmers also noted that an affirmation or representation may amount to a warranty provided that "it is intended as such—that is to say, if it is intended to form part of the contract." [21] These words are particularly perplexing. For a representation intended to form part of the contract is, in effect, a contractual term; as a contractual term it is a part of the seller's promise. In short, the annotation is tautologous, for all it means is simply that a promise may amount to a warranty. But the whole point about the representation is that it induces the agreement, *i.e.*, induces the buyer to buy.[22] It follows that a representation "forming part of the agreement" fulfils no separate function. Unfortunately, not only have the books dutifully adopted the Chalmers view,[23] but the House of Lords has also given it judicial recognition. Thus in *Heilbut Symons & Co.* v. *Buckleton* (1913) [24] an important affirmation was held not to amount to a warranty because it did not "appear on evidence to be so intended," [25] and Lord Moulton purported to re-enunciate "the true principle of law which was laid down in early days by Holt C.J." [26] In point of fact, Holt had never said anything about "intention," and the requirement of "intent" was first mentioned by Buller J., in *Pasley* v. *Freeman* (1789) [27] and attributed by him to Holt. And all that Bullen probably meant was not an intention to contract, but an intention to *induce* the other party. The true meaning of "intent" was well stated by Benjamin as follows: [28]

> "In determining whether warranty was intended, a decisive test [29] is whether the seller assumes to assert a *fact* of which the buyer is ignorant or merely states an opinion or judgment upon a matter about which the seller has no special knowledge, and on which the buyer may be expected also to have an opinion

warranty of quality. For the latter development, see § 4, *infra*. It should, perhaps, also be noticed that not until the Common Law Procedure Act, 1852, was a sharp distinction made between tort and contract; *cf.* Bullen and Leake, *Pleading* (1860) v, vi.

[21] Chalmers, *op. cit.*, 46–7.

[22] *Cf.* 4 Williston, *Contracts*, § 971.

[23] *e.g.*, Salmond and Williams, *The Law of Contracts* (1945) 236–7; Cheshire and Fifoot, *Law of Contracts* (2nd ed.) 88–90.

[24] (1913) A.C. 30.

[25] *Per* Lord Moulton, *ibid.*, at 49. But compare this with Lord Moulton's remarks in *Schawel* v. *Reade* (1913) 2 Ir.R. 81 at 85, 86.

[26] *Ibid.*

[27] 3 T.R. 51, 57. *Cf.* Williston, *op. cit.* (1908) 21 Harvard L.R. 555, 560–1.

[28] *Benjamin on Sale* (7th ed., 1931) 691. This passage appears in all editions with the two alterations mentioned in notes (29) and (30), *infra*. Indeed, the passage was adopted by the Court of Appeal in *De Lassalle* v. *Guildford* [1901] 2 K.B. 215, 221, but the reporter failed to indicate where this quotation came from. Because of this typographical omission, Lord Moulton selected it for criticism as a "serious deviation from correct principle." See on all this, 1 Williston, *Sales*, § 196, and also by the same author (1913) 27 Harvard L.R. 1.

[29] In the last edition, the words "decisive test" are replaced by "valuable, though not decisive test"

and to exercise his judgment. In the former case it is a warranty, in the latter not." [30]

There is another aspect of all this. The alleged distinction between affirmations intended to form part of the contract and affirmations not so intended has sometimes been taken to mean that there is a vital difference between conditions and warranties on the one hand and representations on the other, the reason being that whilst the former are "integral" or "substantive" parts of the contract, the latter are not.[31] But this meaning of "intention" seems as mistaken as the one we have previously considered. And it is respectfully submitted that, what is actually implied in this distinction is not the difference between "substantive" and "non-substantive" parts of a contract, but the distinction between *material* and *immaterial* misrepresentations. That this has not been seen is probably simply due to the fact that a seller's representations are usually material inasmuch as they affect the merchantable quality of the goods. Yet there may be immaterial representations also. Suppose a vendor represent his bicycle as "practically new" and also affirms that he bought it only a fortnight earlier;. the latter statement, if false, may nevertheless be regarded as immaterial, provided the bicycle is practically new. The short point is that only material representations amount to warranties, and in the following discussion we shall assume that the representations are material.

To summarise. The misfortune is that the draftsman did not perceive the *dual* nature of the warranty more clearly. For not only was it clearly recognised in many nineteenth century decisions that a warranty could be both a promise and a representation,[32] but it is precisely this duality which makes the warranty that extremely useful as well as indispensable concept in the sale of goods. Consider, for example, the usual case where A buys goods from B, B stating that the goods are sound (*e.g.*, "I can also say that the goods are in perfect condition"). In a sense, this statement may be regarded as part of B's offer (or promise) to sell or deliver "perfect" goods. But in another sense,

[30] The last sentence is left out in the last edition

[31] This distinction derives from Williams J.'s statement of the law in *Behn* v. *Burness* (1863) 1 B & S. 877; 3 B & S. 751, at 753–5. Representations which were not "substantive" parts of the contract, the learned judge called "mere" representations.

[32] See especially the following cases: *Salmond* v. *Ward* (1825) C. & P. 211; *Cave* v. *Colman* (1828) 3 M. & R 2; *Wood* v. *Smith* (1829) 4 C. & P. 45; *Allan* v. *Lake* (1852) 18 Q B. 560; *Stuckey* v. *Bailey* (1862) 1 H. & C. 405; *Cowdy* v. *Thomas* (1877) 36 L.T.(N.S.) 22. The decision in *Hopkins* v. *Tanqueray* (1854) 15 C.B. 130; 23 L.J.C.P. 163, seems to contradict all this, but it is submitted that the better explanation of that case lies in a remark by Maule J., 15 C.B., at 140, to the effect that the seller's assurance was so antecedent to the actual sale that it could only be regarded as an expression of opinion and not as a misrepresentation of fact inducing the buyer to buy the horse.

B only represents the goods as sound, which representation constitutes an inducement. Yet to try to classify B's statement as either promise or representation would be a rather sterile and unnecessary undertaking. All that we need usefully say is that we have here a dual liability, so that B's statement must constitute a warranty, whether it amounts to a promise or to a representation.[33]

8. THE "COLLATERAL" ASPECT OF THE WARRANTY. The other misleading word in the statutory definition is "collateral." This term has, unfortunately, very many meanings which (if only for the sake of comprehensive discussion) may perhaps be fully listed.

(1) A warranty may be "collateral" for the purposes of the law of evidence, *i.e.*, it may operate as an exception to the parol evidence rule and may therefore be given in evidence although the agreement is reduced to writing.[34]

(2) A warranty may be "collateral" from the point of view of pleading, *i.e.*, a seller suing for the price of goods need not declare that he has performed all warranties; it is for the buyer to complain of their breach by way of defence or counter-claim. Thus, the meaning of collateral is simply that it shifts the burden of proof.[35]

(3) A warranty may be regarded as "collateral" in the sense in that it is auxiliary to the "main purpose" of the sale, which main purpose is the transfer of title.[36]

(4) A warranty may similarly be regarded as "collateral" in that it is a special agreement accompanying the sale of specific goods and not an integral part of the *description* of the goods.[37]

(5) A warranty may be called "collateral," again in the sense of a special, separate undertaking, the "sole effect" of which is "to vary or add to the terms of the principal contract."[38] Stated differently, the warranty is collateral in that it is a specially agreed exception to the general rule of *caveat emptor*.

(6) A warranty may be regarded as "collateral" where collateral means less important: a collateral warranty is a less important

[33] Yet the notion that the warranty is a "purely" contractual concept seems still to persist; see, for example, Rabel, "The Nature of the Warranty" (1950) 24 Tulane L.R. 278, at 279. It is submitted that this is only true in the sense that the warranty will, in the nature of the case, only arise in a contract situation; which does not mean, however, that the *basis* of liability for breach of warranty is also always contractual. See also Prosser, "The Implied Warranty of Merchantable Quality" (1948) 21 Can.B.R. 446, at 447–8.

[34] *De Lassalle* v *Guildford* [1901] 2 K.B. 215. For a full discussion of this problem, see J. Williams, *The Statute of Frauds*, s 4 (1932) 188–198; Benjamin, *op cit.*, 696–7.

[35] *Parker* v. *Palmer* (1821) 4 B. & Ad. 387, at 391. The decision was foreshadowed in *Clark* v. *Gray* (1805) 6 East 564. See, generally, 5 Williston, *Contracts*, § 1461.

[36] See the statutory definition, s. 62 (1), quoted § 2, *supra*.

[37] See Bullen and Leake, *op. cit.*, 267, note (*a*). "[For] a warranty of quality is not an essential element of a sale, it is a collateral engagement to be attached to or omitted from it at the pleasure of the parties," Williams, *Vendor and Purchaser* (4th ed., 1936), vol. II, 758.

[38] *Per* Lord Moulton, *Heilbut* v. *Buckleton* [1913] A.C. 30, at 47–8

obligation than the "condition"—the condition denoting the seller's basic duty to deliver such goods as answer the description.[39]

(7) A warranty may be called "collateral" from the point of view of legal effect, inasmuch as, according to the statutory definition, it gives rise to a right to damages, but not to a right to repudiate the goods.[40]

(8) A warranty may be "collateral" in that it is an "independent" and not a "dependent" promise.[41]

(9) A warranty may, finally, be "collateral" from the point of view of pure form or verbal sequence.

It may be pointed out that (1) *supra* may still be useful with regard to the admissibility of parol evidence; (2) *supra* has no longer any modern importance in sale of goods; and that (3) to (8) *supra* illustrate various aspects of the warranty which resulted from the distinction that was drawn between sale by description and sale of specific goods. This will become more explicit in the course of this discussion. On the face of it, the ninth and last meaning of "collateral" should also be the least important, but, unfortunately, this is not so.

Now what is meant by collateral in "form" or "verbal sequence"? A simple example will make this clear. Suppose A says to B: "I'll sell you my car," and B replies: "I'd take it, but is it all right?" And A replies: "I can guarantee that it is in excellent condition." Thus A "sells" the car, and subsequently, separately as it were, guarantees or warrants its excellent condition. The warranty is therefore collateral in form or verbal sequence, because it is separate from, or subsequent to, the seller's promise to sell the car.[42]

In the early law of sales, most warranties were collateral in form. The reason was that the typical situation of buying and selling was the horse-sale in the market-place combined with the stern rule of *caveat emptor*.[43] For, because of *caveat emptor*, the early buyer could only protect himself against the purchase of a latently defective horse by requiring a special warranty of quality which because of the accidents of the situation was therefore collateral in form.

This had, it is submitted, two far-reaching effects. In the first place it gave rise to the idea that a warranty was a special agreement quite distinct from the bargain and sale of the specific article: in other words, a bargain and sale *plus* an express warranty seemed to represent two contracts instead of one. Indeed, the more so,

[39] *Per* Fletcher-Moulton L.J. (as he then was) in *Wallis* v. *Pratt* [1910] 2 K.B. 1003, at 1014.

[40] This follows from the statutory definition and from Chalmers' distinction between conditions and warranties, see Chalmers, *op. cit.*, pp. 49, 152, 175 and 225.

[41] See § 10, *infra*.

[42] For a fuller discussion of this, see § 9, *infra*.

[43] The history of *caveat emptor* has been brilliantly dealt with by Professor Hamilton, "The Ancient Maxim of Caveat Emptor" (1931) 40 Yale L.J. 1133.

because the bargain and sale was executed on the spot (*e.g.*, the instantaneous delivery of the horse for the immediate payment of the price), so that the only contract that remained over was the "special contract of warranty." In the second place it also promoted the bifurcation of the law of sales into the sale of specific goods (with or without warranties) on the one hand and the sale by description on the other. This distinction, artificial and inefficient though it was, became the cornerstone upon which, in the nineteenth century, the whole conceptual frame-work of the law of sale of goods was built.

4. THE WARRANTY AND "DESCRIPTION." In the early nineteenth century the law of sale of goods underwent a profound transformation. The courts developed the theory that "sale by description" constituted some sort of special type of sale; and also substantially restricted the rule of *caveat emptor* by creating the warranty of quality implied-by-law. These developments took place concurrently and overlapped, and because of it created much confusion. To explain this we must consider two well-known, yet also very misleading, cases both decided by the Court of Exchequer in 1888. In *Barr* v. *Gibson*[44] A bought a ship from B which at the time of the sale was supposed to be at sea but which in fact had got ashore and become a near-wreck. Her value had dropped from £4,200 to £10, the jury having found that she was just a cheap bundle of timber. In the second case, *Chanter* v. *Hopkins*,[45] X ordered a "smoke-consuming furnace" from Y to be fitted in X's brewery. X had carefully indicated what he needed, but the furnace proved to be totally unsuitable.

In both these cases the essential question was whether a warranty of quality would be implied by law since the seller had neither promised nor affirmed merchantability (*i.e.*, the seaworthiness of the ship) or fitness (*i.e.*, fitting X's brewery). But it was held that no such implication could be made because the chattels were specific and ascertained. Thus Baron Parke said in *Barr* v. *Gibson*[46]:

> "In the bargain and sale of an existing chattel, by which property passes, the law does not, in the absence of fraud, imply any warranty of the good quality or condition of the chattel so sold. The simple bargain and sale, therefore, of the ship does not imply any contract that it is then seaworthy, or in a serviceable condition; . . . But the bargain and sale of a chattel, as being of a particular description, does imply a contract that the article sold is of that description. . . ."

And in *Chanter* v. *Hopkins*, Lord Abinger delivered himself of the following famous passage[47]:

> "A good deal of confusion has arisen in many of the cases on this subject from the unfortunate use made of the word

[44] 3 M. & W. 390; 7 L.J.Ex. 124.
[45] 4 M. & W 399; 8 L.J.Ex. 14.
[46] 3 M. & W. 390. at 399–400.
[47] 4 M. & W., at 404.

'warranty.' Two things have been confounded together. A warranty is an express or implied [48] statement of something which the party undertakes shall be part of a contract, and though part of the contract, yet collateral to the express object of it. But in many of the cases, the circumstance of a party selling a particular thing by its proper description has been called a warranty, and the breach of such a contract the breach of warranty; but it would be better to distinguish such cases as a non-compliance with a contract which a party has engaged to fulfil; as if a man offers to buy peas of another, and he sends him beans, he does not perform his contract; but that is not a warranty; there is no *warranty that he should sell him peas*, the *contract is to sell peas*, and if he sells him anything else in their stead, it is a non-performance of it." [49]

Several points arise from these judicial statements. In the first place, both Baron Parke and Lord Abinger unfortunately misconstrued the effect of several earlier decisions. For these had clearly established not only that a warranty of merchantable quality would be implied, especially in such situations where the buyer had had no opportunity to inspect the goods, but also that this implication did not depend upon the distinction between the sale of specific chattels on the one hand and the sale by description on the other. This is clearly brought out by the two earliest leading cases concerning the implied-by-law warranty of quality. In *Gardiner* v. *Gray* (1815) [50] the buyer bought 12 bags of "waste silk" which turned out to be unmerchantable. Lord Ellenborough said: "Where there is no opportunity to inspect the commodity, the maxim of *caveat emptor* does not apply. He [*i.e.*, the buyer] cannot, without a warranty, insist that it shall be of any particular quality or fineness, but the intention of both parties must be taken to be that it shall be saleable in the market under the denomination mentioned in the contract between them. The purchaser cannot be supposed to buy goods to lay them on a dunghill." [51] Similarly, in *Jones* v. *Bright* (1829) [52] the buyer bought copper from a manufacturer for the particular purpose of sheathing a ship. But the copper proved defective in that it lasted only four months instead of the normal period of four years." "The law, then," said Best C.J.,[53] "resolves itself into this: that if a man sells generally, he undertakes that the article is fit for some purpose; if he sells for a particular purpose, he undertakes that it shall be fit for a particular purpose."

Clearly, the 12 bags of "waste silk" were as specified as the wrecked ship; and the copper for the ship was as identified as

[48] The word "implied" could obviously only mean "implied in fact."
[49] My italics.
[50] 4 Camp. 144. *Cf.* also *Laing* v. *Fidgeon* (1815) 4 Camp. 169; *Okell* v. *Smith* (1815) 1 Stark. 107; *Bridge* v. *Wain* (1816) 1 Stark. 504
[51] *Ibid.*, at p. 145.
[52] 5 Bing. 533.
[53] *Ibid*, at 546.

the "smoke-consuming furnace." [54] And whilst it is true that in making the implication of merchantable quality, both Lord Ellenborough and Best C.J., pretended that they were merely giving effect to the "contractual intention" of the parties, it is equally obvious that, whether or not such was the actual contractual intention, the warranty implied-by-law constituted a completely new obligation upon the seller, *i.e.*, an obligation to deliver an article that was merchantable or fitted the particular purpose indicated, irrespectively of whether the seller had actually either promised or affirmed that the article in question would be merchantable or fitting. Indeed, in *Shepherd* v. *Pybus* (1842) [55] this obligation was extended. In this case a warranty of quality was implied in a sale of an admittedly specific barge which the buyer had inspected and in which property had passed to him. In other words, a warranty was implied by law not because the buyer had not had an opportunity for inspection, but because the buyer had not been able to exercise a judgment of his own. "[And] this," as Mellor J. so rightly observed in *Jones* v. *Just* (1868),[56] "appears to us to be at the root of the doctrine of implied warranty, and that in this view it makes no difference, whether the sale is of goods specially appropriated to a particular contract, or to goods purchased as answering a particular description." [57]

The whole development just traced completely contradicts the rationale in *Barr* v. *Gibson* and *Chanter* v. *Hopkins*, and both these decisions plainly reveal themselves as inconsistent and incompatible with the essential pattern of the nineteenth-century law. It therefore follows that their authority stands almost fatally impaired, at

[54] This point was first made by Professor Prosser, "The Implied Warranty of Merchantable Quality" (1948) 21 Can.B.R. 444, at 470.

[55] 3 Man. & S. 868; 11 L.J.C.P 101. *Barr* v. *Gibson* was not cited at all, but this does not affect the soundness of the decision; see especially the reasoning of Tindal C.J., 3 Man. & S., at 880–1 This decision, which must also be taken to overrule *Bluett* v. *Osborne* (1816) 1 Stark. 384, was foreshadowed by *Brown* v. *Edgington* (1841) 2 Man. & G. 279; 10 L.J.C.P. 66. In *Brown*, however, the seller was not a manufacturer, but a dealer, and it is therefore the first definite "dealer"-case. See also *La Neuville* v. *Nourse* (1818) 3 Camp. 351, and *Burnby* v. *Bollett* (1847) 16 M. & W. 644.

[56] (1868) L.R. 3 Q.B. 197, at 207.

[57] This, it is submitted, is the essential *ratio decidendi* in that case. Mellor J., however, at the beginning of his judgment also enunciated *obiter* five rules according to which the cases concerning *caveat emptor* should be classified (see (1868) L.R. 3 Q.B., at 201 *et seq.*). The trouble with these rules is twofold: (1) His first three rules make nonsense of his actual *ratio decidendi*, for they state and restate the principle that *caveat emptor* applies in full if the sale is for a specific chattel which *may* be inspected. This, however, was also the case in the facts before the learned judge. (2) The last two rules state the principle that where the seller contracts to *supply* goods, a warranty of quality will be implied if either the buyer has stated his particular purpose or there is no opportunity of inspecting the goods. But the seller may contract to *supply* chattels which *may* be inspected What then, is the decisive test the potential opportunity to inspect or the actual reliance by the buyer? Actually, Mellor J. attempted to reconcile too much. In formulating his rules he seems to have forgotten that he would have to make a choice between some contradictory decisions. One cannot build a principle as one cannot make an omelette without breaking (at least some) eggs.

any rate with regard to the general proposition that in the case of specific chattels no warranty of merchantable quality or fitness would be implied by law. But even wrong or obsolete decisions sometimes preserve a petrifying vitality all their own, especially if Baron Parke happened to be their champion. *Barr* v. *Gibson* was followed in a few later cases[58]; it was also given a new lease of life through its incorporation in Mellor J.'s rules concerning *caveat emptor*.[59] From there it passed into the Sale of Goods Act and Chalmers quotes Parke B., with apparent approbation.[60] The total confusion can best be seen in the peculiar drafting of section 14 of the Act, which will later be discussed in somewhat greater detail.[61] In short, *Barr* v. *Gibson* has been responsible for so much harm that one is chary of according it even decent burial.

In view of all this, Lord Abinger's statement of the law assumes renewed importance.[62] So full of assurance was his style, and so impressionably apt his peas-and-beans analogy, that it has hardly occurred to anyone that, in certain respects, he might have been mistaken.[63] For implicit in his statement is the distinction between (1) a buyer buying "peas" which are specially promised or represented as being "merchantable," and (2) a buyer buying "merchantable peas"; and, according to Lord Abinger, in (2) the word "merchantable" is not a warranty but part of the definition or description of the goods. But the distinction between the buyer buying "merchantable peas" and "peas warranted merchantable" is purely formal and accidental, so that this difference in verbal sequence can make no difference to what the seller promises to sell or the buyer is induced to buy. The short point is that "merchantable" amounts to a warranty, whether collateral in form or not, and the delivery of "unmerchantable peas" is as much a breach of warranty as the non-delivery of "peas warranted merchantable."[64] Furthermore, Lord Abinger also overgeneralised

[58] See, *e.g.*, *Emmerton* v. *Mathews* (1862) 7 H. & N. 586; 31 L.T.Ex. 189; *Smith* v. *Baker* (1878) 40 L.T. 261

[59] See note 57, *supra*.

[60] Chalmers, *op. cit.*, 60.

[61] See § 10, *infra*.

[62] See p. 492, *supra*.

[63] It must be noticed that Lord Abinger was not "protesting" as Chalmers seems to have thought (*op. cit.*, 175), against the confusion between conditions and warranties, because he was simply not concerned with conditions in that case. Nor was he concerned with laying down a special rule relating to goods sold under a patent name. For this rule, now incorporated in the proviso to s. 14 (1), *Chanter* v. *Hopkins* is of course still the leading case though subsequent decisions have modified it greatly; see especially *Bristol Tramways Co.* v *Fiat Motors, Ltd.* [1910] 2 K.B. 831; *Baldry* v. *Marshall* [1925] 1 K.B. 260. See Mecham, "Trade Names" (1927) 11 Minnesota L.R. 485.

[64] Professor Williston points out that at one time it was doubtful whether words of description were warranties or not. "The law is now, however, convincingly settled that descriptive statements do constitute a warranty," 1 Williston, *Sales*, § 205. See also *Parsons* v. *Sexton* (1847) 4 C.B. 899; 16 L.J.C.P. 181; *Allan* v. *Lake* (1852) 18 Q.B. 560.

the "peas-beans" analogy. Where the seller merely sells "peas" and delivers unmerchantable peas, the question is not whether the seller has performed his contract or whether "unmerchantable peas" answer the definition of "peas." For the seller only sells *peas*, he does not promise to deliver *merchantable peas*. The crucial question therefore is whether *caveat emptor* will apply, or whether, on the other hand, the law will impose an additional duty to supply *merchantable peas*, whether the sale is for specific goods or not.

5. THE DOCTRINE IN STREET V. BLAY. The law, however, had from early on also been troubled by another difficulty which for present purposes may be called the doctrine in *Street* v. *Blay* (1831).[65] In that case the court of King's Bench enunciated the broad doctrine that a buyer of a specific chattel, in which property passes to him immediately, may not reject the specific chattel for breach of warranty, on the ground that the buyer may not unilaterally revest the title in the seller.[66]

For this doctrine very little authority previously existed, and what there was was rather confused and inconclusive.[67] In fact, the better available authority was overwhelmingly against it.[68] Perhaps the then most recent authority against the doctrine was the decision in *Poulton* v. *Lattimore* (1829),[69] in which the buyer bought certain seeds which the vendor had warranted to be "good growing seed" but which later turned out to be completely worthless. Not only was it clearly assumed that the buyer could reject the goods in all cases where they did not correspond to warranty, but the strange question was raised whether a buyer could both escape liability for the price and not return the article at all.[70]

Unfortunately, the doctrine in *Street* v. *Blay* became an immediate success with Baron Parke, who even referred to it on some not

[65] 2 B. & Ad. 456.

[66] Lord Tenterden C.J. did not actually lay down a very definite doctrine. He, in fact, expressly denied such an intention (at p. 460), and he merely said (at p. 463) that in an executed sale, as distinct from an executory one, the vendee *may not* have a right to return the article. However this may be, this case has subsequently been treated as laying down a precise rule.

[67] *Cf. Weston* v. *Donnes* (1778) 1 Doug. 23; *Towers* v. *Barratt* (1786) 1 T.R. 133; *Payne* v. *Whale* (1806) 7 East 274; *Power* v. *Wells* (1778) 1 Doug., n. 24; *Dr. Compton's Case* (1786) 1 T.R. 138, at 186; 1 H Bl 20, n. (*b*).

[68] The right of rejection seems recognised in *Power* v. *Wells* (1778) 2 Cowp. 818; *Fielder* v *Starkin* (1788) 1 H.Bl. 17. Stronger authorities are: *Buchanan* v. *Parnshaw* (1788) 2 T.R. 745, at 746, *per* Lord Kenyon; *Curtis* v. *Hannay* (1800) 3 Esp.C. 82; *Payne* v. *Whale* (1806) 7 East 274, at 278–9; *Caswell* v. *Coare* (1809) 1 Taunt. 566; *Okell* v. *Smith* (1815) 1 Stark. 107; *Yates* v. *Pim* (1816) 6 Taunt. 446; 2 Marsh. 141; *Parker* v. *Palmer* (1821) 4 B. & Ald. 387, *per* Best C J., at 395; *Germaine* v. *Burton* (1821) 3 Stark. 32; *Toulmin* v. *Hedley* (1845) 2 Car. & Kir. 157. For a full discussion see Williston, "Rescission for Breach of Warranty" (1903) 16 Harvard L.R. 465. Williston's views were strongly opposed by Professor Burdick in (1904) 4 Col. L.R. 1; *ibid.*, at 105 (Williston's reply) and Burdick's "Codification of the Doctrine of Rescission," *ibid.*, at 264.

[69] 9 B. & C. 257; 7 L.J.K.B.(o.s.) 225.

[70] See the argument by Sergeant Andrews, 9 B. & C. 257, at 260.

very relevant occasions.[71] However, the high-water mark of the new doctrine was reached in *Dawson* v. *Collis* in 1851.[72] The buyer bought goods by sample but the goods did not correspond to sample. He refused to accept the goods and the vendor then brought an action for the purchase-price. Apart from an interesting point of pleading,[73] the court applied the principle in *Street* v. *Blay* and disallowed the right of rejection. Although it is not quite certain whether they regarded a sale by sample as a sale of specific goods,[74] it is certain that the court wished to extend the doctrine in *Street* v. *Blay*,[75] even to executory contracts. Indeed, the court was trying (if one may rationalise its reasoning) to establish some kind of compromise: let *caveat emptor* continue to apply to the extent that the buyer's right of rejection would completely disappear; on the other hand, let the buyer have a right to damages in every case where the goods prove to be unmerchantable. Fortunately, such a rule did not become part of English law, even though it had the advantage of simplicity.

Only one exception the court would allow: where the goods were wholly worthless, the right of rejection should continue to exist. For this exception, the cases of *Poulton* v. *Lattimore*[76] and *Young* v. *Cole* (1837)[77] were cited. But the latter case was not really in point, for it dealt with a completely different situation. A stockbroker had sold, on behalf of the defendant, certain bonds which later turned out to have no value. The stockbroker reimbursed the defendant to whom he had previously handed over the purchase-price, but who now refused to return it. It was held, that the stockbroker was entitled to recover the money paid over as there had been a total failure of consideration. Yet Williams J., in *Dawson* v. *Collis*[78] interpreted *Young* v. *Cole* as establishing a distinction between condition and warranty, thus confusing the condition with total failure of consideration and the quasi-contractual action to which it gave rise. But once the fateful word "condition" was thus introduced, it was

[71] *Dixon* v. *Yates* (1833) 5 B. & Ad. 313; *Syers* v. *Jonas* (1848) 2 Ex 111, at 117; *Murray* v. *Mann* (1848) 2 Ex. 538, at 538–9; see also *Allen* v. *Cameron* (1838) 1 Cr. & M. 832; *Pateshall* v. *Trouter* (1835) 8 Ad. & E. 103, at 104, *Gomperts* v. *Denton* (1832) 1 Cr. & M. 209.

[72] 10 C.B. 523; 20 L.J.C.P. 116. *Street* v. *Blay* had previously already been applied in *Parsons* v. *Sexton* (1847) 4 C.B. 899; 16 L.J.C.P. 181.

[73] The point was an exceptionally good example of an "argumentative traverse," the buyer pleading non-assumpsit in an action for the price for goods sold and delivered.

[74] Jervis C.J., 10 C.B., at 531, seems to have regarded it as a sale of specific chattel, whereas Cresswell J. seems to have held differently, *ibid.*, at 533.

[75] "But it seems to me that the principle of *Street* v. *Blay* ought to be extended, and that the just and convenient thing is, that the vendee should have an action for breach of warranty . . . ," *per* Maule J., at 532.

[76] 9 B. & C. 257; 7 L.J.K.B.(o.s.) 225. This case is now the illustration for s. 53 (1) (*a*).

[77] (1837) 3 Bing.N.C. 724; 4 Scott 489.

[78] (1851) 10 C.B. 523, at 530.

but a very small step to the further generalisation that a breach of warranty would not entitle rejection "unless there be an express condition to that effect."[79] This new and mistaken distinction was later taken up by Lord Blackburn (as he became) in the very influential decision of *Kennedy* v. *Panama, etc.* (1867),[80] and thence passed into the Sale of Goods Act,[81] and indeed beyond.[82]

Before going further it is necessary to consider the doctrine in *Street* v. *Blay* as such, assuming that it is confined to specific chattels only. Two things may be briefly said about it. First, the doctrine is unjust for it unduly penalises the buyer. "He does not want, as Professor Williston has put it,[83] an unsound horse, worth half the money and the difference in damages." Secondly, it is entirely artificial to argue that the buyer must lose his right of rejection because he cannot unilaterally divest himself of "property" or "title." For the notion of "passing ownership" is really only useful where the question arises as to who, between buyer and seller, is to bear the risk of loss or where third parties become involved. Furthermore, the buyer is entitled to revest the property in the case of fraud; and the seller has even the two further rights of (i) retaining and (ii) reselling the goods, even though "title" may have left him.[84]

It follows that the doctrine in *Street* v. *Blay* creates legal complications which have no intrinsic merit.[85] Above all, it poses the unnecessary problem of what is a sale of a specific chattel as distinct from a sale of description. Actually, as we shall later see,[86] many "specific" sales were treated as sales by description and rejection was allowed. But if the "passing of the property" had been so insuperable a theoretical hindrance, such a development could hardly have been possible.

6. "Sale by Description" Reconsidered. One of the important results of (especially) Lord Abinger's judgment in *Chanter* v. *Hopkins* (1838)[87] was the introduction of the theory of sale by description. This theory had (and indeed still has) one advantage and one disadvantage. The advantage was that the "sale by description" limited the applicability of the doctrine

[79] See, for example, the headnote to *Dawson* v. *Collis*, 10 C.B. 523. Observe that "condition" is here used in two completely different senses: (i) total failure of consideration; and (ii) a stipulation in the contract expressly providing for a right of rejection.
[80] (1867) L.R. 2 Q.B. 580, at 587.
[81] Chalmers, *op. cit.*, 60.
[82] See § 10, *infra*.
[83] Williston, "Rescission for Breach of Warranty" (1906) 16 Harvard L.R. 465, at 472.
[84] See ss. 41, 44, 48 (3) of the Act.
[85] The whole concept of title in the contract of sale has been brilliantly discussed by K. N. Llewellyn, "From Title to Contract and a Bit Beyond" (1933) 15 New York L.Q.R. 159. See also my article, "The Ambiguity of Promise," 47 Northwestern University L.R. (formerly Illinois L.R.) 1 at 3–5.
[86] See § 8, *infra*.
[87] 4 M. & W. 399. See § 4, *supra*.

in *Street* v. *Blay*, simply because "sale by description" was never clearly defined. The disadvantage was that "sale by description" emerged as a special category of sale wholly distinct from the sale of specific chattels.

To illustrate the last point, we must deal with a trilogy of cases which established the description-theory in its modern form, and upon which section 13 of the Sale of Goods Act is based. The first is *Nichol* v. *Godts* (1854),[88] in which the plaintiff sold to the defendant "foreign refined rape oil . . ; warranted only equal to samples." The defendant buyer refused to take it because what the plaintiff delivered was not "foreign refined rape oil" but a mixture of hemp and rape oil. Since the seller's warranty extended only to the sample which he had shown to the buyer, and since the oil he actually supplied corresponded to that sample, he argued that he had fully performed his contract so that the buyer had no option to reject, although he admitted that the sample was not "foreign refined rape oil." The court held for the buyer on the grounds, first, that the purchaser was only bound to take the goods as described, and, secondly, that the samples referred "only to quality." Thus, Pollock C.B. argued that the oil must not only correspond with the samples in quality, but must also "agree with the description of the contract of it as to its character."[89] And Parke B. said: "The warranty affects only the quality, but not the *nature* of the *article itself*."[90]

The next case is *Wieler* v. *Schilizzi* (1856)[91] where the plaintiff had bought a specific cargo of "Calcutta linseed *tale quale*." It was then discovered that the linseed contained a large admixture of foreign seeds which rendered the linseed unmarketable as Calcutta linseed. The jury was asked whether this admixture had altered the "distinctive character" of the linseed and they returned a verdict for the plaintiff. On a motion for a new trial, the court refused to disturb the verdict. "The purchaser had a right," Willes J. said,[92] "to expect, not a perfect article, but an article which would be saleable in the market as Calcutta linseed. If he got an article so adulterated as not reasonably to answer that description, he did *not get what he bargained for*."[93]

In *Josling* v. *Kingsford* (1868)[94] the facts were rather similar. The buyer bought oxalic acid, the samples and the bulk of which his servant had examined, but it was later found to contain a 10 per cent. admixture of sulphate and magnesia. This, however,

[88] 10 Ex 191; 23 L.J.Ex. 314. The decision seems to have been so revolutionary that its correctness was at first doubted, see the remarks by counsel in *Josling* v. *Kingsford* (1868) 13 C.B.(N.S.) 447, at 456.
[89] *Ibid.*, at 193.
[90] *Ibid.*, at 195. My italics.
[91] 17 C.B. 619.
[92] *Ibid.*, at 624.
[93] My italics.
[94] 13 C.B.(N.S.) 447.

could not have been detected by mere inspection and was only discovered after an analysis. The buyer then sued in damages for breach of contract, and (alternatively) for breach of warranty, although the seller had expressly refused to assume any responsibility for the strength of the oxalic acid. Erle C.J. directed the jury that there was no evidence of any warranty, but that the seller could only perform his contract by supplying such oxalic acid which might properly be said to come within the description of oxalic acid. On a motion for a new trial, the court refused to disturb the jury's verdict in favour of the buyer, and Williams J. said[95]: "However completely the defendant may have guarded himself against the contracting that the thing was of any particular quality, it is not possible to construe the contract in any other way than that it was a part of the agreement that the subject of the sale should be the oxalic acid of commerce."

The results of this trilogy were profound and far-reaching. In the first place, they completed and crystallised the bifurcation of the law of sale of goods. Whereas in the sale of a specific chattel only complete worthlessness, *i.e.*, total failure of consideration, would entitle the buyer to reject, in a sale by description even a partial failure of consideration would give rise to such a right. This was not merely the corollary to the rule in *Street* v. *Blay*,[96] but was also the outcome of the "higher" view that was now taken of sale by description. For it seemed to be assumed that there was some metaphysical connection between the "description" of the goods and their "kind," "nature," "distinctive character" or "identity"; the warranty, on the other hand, only affected "quality" and not the "nature" of the article itself.[97] It became therefore quite natural to look upon merchantability as part of the "description," since "unmerchantable" goods could be regarded as not answering their true "nature," "character" and so on.[98] In the second place, the bifurcation of the law also established the completely wrong antithesis between the condition on the one hand and the warranty on the other. Indeed, Lord Blackburn regarded *Josling* v. *Kingsford*[99] as "a striking illustration of the distinction" between the two.[1] The explanation was that in the sale by description, the seller's statements (*i.e.*, promises and representations) with regard to quality were now called "conditions," whilst similar statements became mere "warranties" in the sale of a specific chattel. But there was

[95] *Ibid.*, at 457.
[96] (1831) 2 B. & Ad. 456; see § 5, *supra*.
[97] See the statement by Parke B. in *Nichol* v. *Godts* (1854) 10 Ex. 191, at 195; cited p. 439, *supra*.
[98] "In all, it seems to me, it is either assumed or expressly stated, that the fundamental undertaking is, that the article offered or delivered shall answer the description of it contained in the contract," *per* Brett L.J. in *Randall* v. *Newson* (1877) 2 Q.B.D. 102, at 109.
[99] (1863) 13 C.B.(N.S.) 447.
[1] Blackburn on *The Contract of Sale*, 2nd ed., 210.

no difference between these two descriptive statements; and, hence, there was, in this context, no difference also between conditions and warranties as such. The difference only arose because of the non-rejection-rule established by *Street* v. *Blay* as well as the rule, for which *Barr* v. *Gibson* (1838) [2] was responsible, *i.e.*, that in the case of specific chattels a special or collateral warranty was required to exclude *caveat emptor*. In other words, the antithesis between conditions and warranty resulted from the telescoping of two quite different doctrines, one relating to the *effect* of a descriptive statement and the other relating to the absence of an implied-by-law warranty of quality in the case of specific chattels.[3]

Thirdly, the result of the above "description" cases was important also in another way. It will be observed that the argument in these decisions, *i.e.*, that the goods did not answer the description, was really begging the whole question. For (to take but one example) the Calcutta linseed *did* answer the description of "Calcutta linseed tale quale," the seller having sold not an ideal type of linseed but a cargo of so-called linseed or linseed such as it was. The seller's liability, therefore, could not rest on the ground that the goods did not correspond to their actual description. The liability could only be explained by saying that the buyer was supplied with goods which in the given circumstances happened to be not merchantable at all. This, however, amounted to no more than to a rather daring and dangerous extension of the implied warranty of merchantability combined with a pretty substantial restriction of the seller's freedom to contract.

These cases also raise another difficulty connected with some aspects of the sale by sample which will briefly be referred to at a later stage. For we must now deal with a rather more fundamental problem, *i.e.*, what does the concept "description" actually describe?

7. Description, Acquaintance, Identity and Sample.[4] A buyer may have knowledge of the article he purports to buy in two rather different ways. In the first place, he will know the subject-matter of the sale by *acquaintance*, *i.e.*, by being directly aware of it; or he will know the subject-matter by *description*, *i.e.*, when he is not aware of it and when all he knows about it is based on the description of the goods. More particularly, the buyer will know the goods by acquaintance in the following three instances:

[2] (1838) 8 M. & W. 390; 7 L.J.Ex. 124.

[3] See on all this, § 4, *supra*.

[4] I have tried to utilise in this discussion some of the principles of modern logic, *i.e.*, the distinction between knowledge by acquaintance and knowledge by description. This distinction was first conceived of by Bertrand Russell, see *Problems of Philosophy*, pp. 69 *et seq.* I have, however, followed the late Professor Susan Stebbing's slightly modified (as well as rather simpler) treatment of the subject; see her *Modern Introduction to Logic* (6th ed., 1948), chaps. III and IX.

(i) the buyer buys *this* object, pointing at it directly;
(ii) the buyer buys an object directly before him, but referring to it by a name;
(iii) the buyer buys an object by way of a sample, *i.e.*, he buys this quality or kinds of the goods.

There is, in fact, no real difference between (i) and (ii); furthermore, it does not usually happen that a buyer will buy merely by pointing his fingers at what he wants without referring to the object by means of a name. It follows that instance (i) is extremely rare, and may for present purposes be disregarded. As for (iii), the parties must at least use some descriptive symbols to determine the *quantity* of the quality agreed on; but as far as the quality of the goods is concerned, the buyer buys (subject to a later qualification) *that* quality, *i.e.*, the quality of which he is directly aware.

On the other hand the buyer will know the goods he is buying by description when he either is not or cannot be aware of them, *i.e.*, in the following three instances:

(iv) the buyer buys a definite object, *e.g.*, the horse "Constantine" which he has never seen;
(v) the buyer buys *a* horse, the seller having many horses;
(vi) the buyer buys a horse as yet unborn or non-existing.

In these three instances the buyer is not, and cannot be (as in (vi)), acquainted with the horse; and it is therefore clear that whatever knowledge the buyer may possess of the objects he is buying he can only have by way of description.[5]

Now what does this classification show us? It shows us that the word "description" is here used principally for the purpose of "identifying" the subject-matter of the sale. Let us first take instance (ii). Here the buyer uses a name, but merely for his and the seller's convenience; he could just as well have referred to *this* or *that*. Now let us consider instance (iv). Although the horse "Constantine" is in law a specific, ascertained and existing chattel because there is only one Constantine, and no other, to which the word "Constantine" applies, the buyer's knowledge of this particular horse is based on description, and on description only. For he does not, and *ex hypothesi* cannot, know the horse called "Constantine" otherwise than by the description(s) about the horse which the seller (or someone else) has given him.[6] And what has just been said about (iv) applies even more strongly to (v) and (vi).[7]

[5] The point is that it is such a descriptive statement as may be understood even "without knowing whether there is anything that may be described by it, and we could use it significantly even if we believed that there was nothing to which the phrase applied," Stebbing, *op. cit.*, chap. III, § 2.

[6] As we shall later see (§ 8, *infra*) it was never quite certain whether this situation amounted to a sale of a specific chattel, or to a sale by description. See, *e.g.*, the discussion in *Bannerman* v. *White* (1861) 10 C.B.(N.S.) 844.

[7] According to Professor Williston (1 *Sales*, s 224), the word description should be confined to identification especially when reference is made to a

There is, however, the important difference between (iv) on the one hand, and (v) and (vi) on the other. Whereas in (iv) the description "identifies" the horse "Constantine" completely, in (v) and (vii) the objects are only identified by reference to a class. For plainly, you cannot identify *a* horse; you cannot identify an unascertained or non-existing horse; all that we can identify is *the* horse, *e.g.*, the horse "Constantine." Lastly, let us consider instance (iii). There, it can easily be seen, the sale is both descriptive and demonstrative; it is demonstrative with regard to quality, and descriptive with regard to quantity. (iii), Therefore, stands midway between (ii) and (iv).

We have so far only been considering the word "description" in the broad sense of "identification." For in order to make a promise meaningful, the parties must promise to buy and sell *something*. And they cannot merely refer to "goods" as such; they must specify the goods to achieve a "certainty of terms," although "certainty" must here be understood in a very relative sense. It is with this aspect alone that the "identification" of the goods is concerned.

There is, however, a further aspect which does not relate to the knowledge of things or objects, but to the knowledge of *truths* about things or objects. Suppose A sells beans to B, adding that they are "good and edible." These beans the buyer knows either by acquaintance or by description inasmuch as he may be aware of a specific bag of beans, or only knows by description a specific, or unascertained, or even as yet non-existing bag of beans. Although he thus knows to which particular bag of beans in the world reference is made (and in the case of unascertained or non-existing goods, he will not even know this) this knowledge does not tell him anything about the quality of the beans. For the description "beans" only denotes the class of beans, including good, bad and indifferent beans. We do not have another name for "bad beans"; we do not classify them, or think of them, as "no-beans"; we call them beans and add that they are rotten.

Assuming that the buyer does not examine the beans, the only knowledge of their quality he will have is what the seller told him. But this is a different sort of "description," *i.e.*, a "description" which asserts some truth about the beans, which assertion may be either true or false. About certain qualities, the buyer may of course have knowledge by acquaintance. Thus he may be directly

class and not to a specific thing. Professor Prosser, "The Warranty of Merchantable Quality" (1943) 21 Can.B.R. 446, at 470–2, strongly disagreed with that view. We shall later see that "description" may mean both "identification" and "warranty." For a rather different analysis of the meaning of description, see Montrose, "The Operation of Description in a Contract of Sale of Goods" (1937) 16 Can.B.R. 760, where it is argued that descriptive words operate either as a definition of the contract goods, or as a condition, or as a warranty. But the criteria for distinguishing these operations are, it is submitted, not made very clear.

acquainted with their external features, their shape, size and colour, though he may know nothing about their edibility. In other words, a buyer may have knowledge, both by description and acquaintance of the truths or qualities of the goods. But where the buyer buys an article on his own knowledge by acquaintance, he cannot complain that the article is not the one he bought; where, on the other hand, he buys on knowledge by description, the responsibility must be the seller's, the buyer having relied on the latter's description rather than on his own knowledge. There is one exception to this. Even though the buyer may, of a given article, have neither knowledge by description nor by acquaintance, the seller is still compelled to give an article of "merchantable" quality.

Two other situations present somewhat greater difficulty. First, suppose that a buyer is confronted by a bag of beans about which the seller asserts that they are edible, but which the buyer has an ample opportunity to examine for himself, *i.e.*, he has an opportunity to get his own knowledge by acquaintance. Is he obliged to get that knowledge? Or is he entitled to rely on his knowledge by description? Although I shall refer to this particular problem at a later stage,[8] the better view seems to be that mere opportunity is irrelevant, and what matters is whether the buyer actually has knowledge by acquaintance or not. Secondly, an apparent conflict may arise between knowledge by description and knowledge by acquaintance. Thus, where a buyer buys a commodity by sample, the seller describing it as "X," although, unknown to either party, the sample represents commodity "Y," the buyer buys *that* quality (as shown in sample), and the seller should only be liable for that quality, whether it is called "X" or "Y." For the buyer buys on his own knowledge by acquaintance, so that the responsibility should be fully his. Nevertheless, certain decisions which we have previously considered[9] seem to go against this proposition. What, then, is the explanation? The explanation, it is submitted, is simply that we use the concept "by sample" in a twofold sense, and that we have, therefore, two types of sale by sample: (i) where the buyer actually samples, inspects, and is fully acquainted with the quality he buys, in which case that quality, and no other is fixed as the subject-matter of the sale, and (ii) where the buyer still "samples" or "inspects" the commodity which the seller offers, which process of sampling or inspecting, however, reveals to him only the external qualities of the commodity in question. As regards its latent qualities or defects the buyer has no personal knowledge by acquaintance, but has to rely on the knowledge by description, if any, given by the seller. This explanation ties up, once the matter is given a little thought, with

[8] See § 9, *infra*
[9] *Nichol* v. *Godts* (1854) 10 Ex 191; 23 L.J.Ex. 314; *Wieler* v. *Schilizzi* (1856) 17 C.B. 619; *Josling* v. *Kingsford* (1863) 13 C.B.(N.S.) 447.

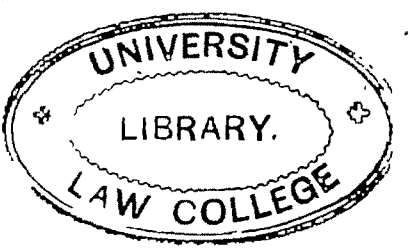
the view previously referred to, that mere opportunity of knowledge by acquaintance is not enough, and that the decisive factor is the buyer's actual possession of such knowledge.

This analysis shows us several things. In the first place, it shows that the distinction between sale by description and sale by specific goods contains a completely false antithesis. For this distinction is based upon the further distinction between identified and non-identified goods. But, as we have seen, the logical antithesis, so far as it goes, is not between specific and described goods, but between goods identified, wholly or partly by description, and goods identified by acquaintance. In the second place, the above distinction also breaks down with regard to the truths or qualities of the goods. For knowledge of them does not depend upon whether an article is specific, *i.e.*, "identified," but simply upon whether the buyer has actual knowledge of the quality (or qualities) of the goods concerned by acquaintance or has to rely on that knowledge by description. As regards the latent defects of an article, a buyer is in exactly the same position whether he buys it specifically or in a sale by description. There is thus no necessity of deciding whether description means "identification" or "descriptive statement" of the goods. By limiting the meaning of "identification," every statement about the goods becomes a part of its description; in this way, moreover, it is also no longer necessary to distinguish between "identity" and "quality."[10]

The logical analysis here presented pinpoints the exact problems with which, so far as defective quality is concerned, the law of sale of goods constantly has to deal. Actually, all these problems the concept of warranty was (and is) quite capable of solving; and, indeed, had the law of warranty been allowed to develop along straightforward and consistent paths, most of the frightful complications which the law now faces would never have arisen.

Samuel J. Stoljar.[11]

(*To be concluded.*)



[10] The analysis here suggested may also throw some light upon the law of mistake in the law of contract. A discussion of this, however, would obviously lead too far.

[11] LL.M.(Lond.); holder of a teaching fellowship at the University of Chicago Law School, 1950–52.

INVESTOR PROTECTION IN THE U.S.A.

THE U.S. Securities and Exchange Commission (S.E.C.) has aroused widespread interest both as an administrative agency with the widest executive, legislative and judicial functions, and as a method of tackling the many pressing problems of securities regulation. Much has been written on it in America, and in England two informative articles have been published in this *Review*.[1] Hitherto, however, there has been no thorough treatment of the body of law and practice which has resulted from its work. Such a treatment is now available in Mr. Loss' monumental and exhaustive treatise.[2]

Mr. Loss' qualifications for writing the book are unique. He has been a member of the Commission's legal staff for 15 years ending as second-in-command of the legal department. In addition he has at Yale undertaken pioneer teaching on its work and is now a Visiting Professor at Harvard. This combination of practical and academic experience, harnessed to the research facilities of the great American law schools, gives him advantages the like of which are, alas, never possessed by English textbook writers, and he has made the best use of them. The result is a book which is of absorbing interest not only to company lawyers but also to those concerned with public administration, company organisation in all its aspects, and the marketing of stocks and shares. To those Englishmen who, like the writer, approach American legal literature with some suspicion, fearing that it will confirm their growing belief that it is a myth to suppose that England and America talk the same language, the book is especially recommended; it is written in what we are pleased to call "the King's English" (presumably it should now be the Queen's ?) but what, Mr. Loss would doubtless retort, is equally entitled to be known as "the President's American." And not only is it well written; it is entertainingly written with welcome touches of humour and irony. As one example of the author's agreeable style may be quoted his fascinating description (at pp. 814 *et seq.*) of various "Alice-in-Wonderland" investment schemes, the catalogue of which is, as he says, "as variegated as the imaginations of promoters. Many of them involve animals, preferably of either a fecund or a fur-bearing variety. A person 'sells' pairs of silver foxes, for example, with the idea that he will supply the expert care (for a charge, of course)

[1] See E. Merrick Dodd in (1942) 5 M.L.R. 174, and (1947) 10 M.L.R. 255.

[2] *Securities Regulation* by Louis Loss. Associate General Counsel, Securities and Exchange Commission, Visiting Lecturer in Law, Yale University, Professorial Lecturer in Law, the George Washington University. [Boston: Little Brown & Co. 1951. pp. xxvii and 1288 $17 50.]

and in due time nature will supply lots of pups—one is tempted to say 'a true stock dividend.'"[3]

The S.E.C. administers six Federal statutes. The first of these, the Securities Act of 1933, is mainly concerned with public issues. The second, the Securities Exchange Act, 1934, has three basic purposes: to afford disclosure to buyers and sellers of securities: to regulate dealings and dealers, both over-the-counter (much more common and important in the States than here) and on stock exchanges; and to control the amount of the nation's credit which flows into the stock markets. The third, the Public Utility Holding Company Act, 1935, is designed to break up the over-concentration of economic power in monopolistic groups of holding and subsidiary gas and electricity utilities and to remedy the attendant evils. The fourth, the Trust Indenture Act, 1939, controls the contents of debenture trust deeds. The fifth, the Investment Company Act, 1940, regulates Investment Trust Companies and Unit Trusts, and the last, the Investment Advisers Act of the same year regulates investment advisers and their practices. In addition the Commission has important functions under Chapter X of the Bankruptcy Act, 1938 (which in the States covers company's winding-up), in assisting the court in connection with company reconstructions.

It will therefore be seen that this legislation covers much of the ground dealt with in England by the Companies Act, the Prevention of Fraud (Investments) Act, 1939, and the Borrowing (Control and Guarantees) Act, 1946, and that the S.E.C. fulfils some of the functions of the Board of Trade, the Capital Issues Committee and the Companies (Winding Up) Department of the High Court.[4] But the greater part of its functions is not in England covered by any legislation or exercised by any public authority, but left to the private control of the stock exchanges and the issuing houses. Mr. Loss rightly comments on the apparent anomaly that U.S.A., the arch-apostles of private enterprise, should have resorted to public control while Socialist Britain (he wrote before the General Election but we remain Socialist by American standards) should have left so wide a field free from State control. It is easy to explain this anomaly by the cynical observation that company promoters in the States have proved so much more "enterprising," but this is an over-facile explanation. In truth, as Mr. Loss points out (at p. 120): "The financial problems in a compact country with a relatively small investor class like England cannot be compared with those faced by a vast country like the United States with a continually expanding economy and an investing public

[3] At p. 319. And note also his reference (at p. 80) to the "odd coincidence whereby one of the houses specialising in the activity in Imperial Russian Bonds on the New York Curb in 1945, was named Karl Marks & Co."

[4] Perhaps (because of the Holding Co.'s Act) one should also add the Monopolies and Restrictive Practices Act and the Monopolies Commission.

which is much larger in both absolute and relative terms. . . ." Even if the States enjoyed " the British genius for unwritten law " which enables us, as Mr. Loss says (at p. 287) " to determine many phases of public policy by resorting to extra-legal techniques," it is obvious that simple geography and complicated Federalism would have precluded them from relying on our solutions. A solution of their problem might have been attempted in a Federal Incorporation Act (such as they have in Canada) but instead incorporation has been left to the States and Federal protection of investors superimposed. In general, though by no means completely, this Federal legislation only affects companies and dealers who use the mails or channels of inter-State commerce. What is said hereafter must be read in the light of this basic limitation, which, however, is not of over much importance since use of the mails is hardly to be avoided in the type of transactions concerned.

The book deals mainly with such parts of the statutes (and the body of law and practice which they have produced) as relate to the regulation of securities. Valuable comparative references are made to the practice of other countries (particularly England and Canada) and the background of common law and of the States " blue-sky " statutes is sketched in in some detail. So far as concerns the regulation of public issues (mainly dealt with by the 1933 Act) the principle adopted has been that of disclosure borrowed from the prospectus provisions of the English Companies Acts. But there is one vital difference; whereas our Registrar of Companies does not attempt to verify the truth of the statements made in the prospectus, the S.E.C. does so with the greatest thoroughness and can stop the registration and the issue if not satisfied. To an American observer our practice must seem incredibly lax, but the point is, of course, that a similar scrutiny is made, but that we leave it to private agencies (the stock exchanges and, especially, the issuing houses). Having regard to the high standards of integrity and thoroughness to which the London issuing houses have now attained it is doubtful whether any advantage to be achieved by expanding the powers of the Board of Trade would be commensurate with the public expense entailed. Indeed, as Mr. Loss points out (at p. 125) the fact that a public agency has scrutinised the prospectus to ensure full disclosure has the disadvantage that it is apt to mislead the investor into supposing that the State has passed judgment on the merits of the investment—a similar consequence is liable to ensue in this country from Treasury consent. Of more interest is the question, which the book poses, of whether either country will be able to rely indefinitely on a policy of mere disclosure; there are powerful schools of thought in both continents which, in the words of Mr. Justice Douglas of the U.S. Supreme Court (and sometime chairman of S.E.C.),[5] hold that

[5] In an article in (1934) 23 Yale Rev (N.S.) 521, summarised by Mr. Loss at pp. 78–81.

"those needing investment guidance will receive small comfort from the balance sheets, contracts, or compilation of other data. . . . They either lack the training or intelligence to assimilate them and find them useful, or are so concerned with a speculative profit as to consider them irrelevant." According to this view, the disclosure principle, to which the laws of both countries are still wedded, is based on an out-moded nineteenth-century philosophy. To quote again from the justice: "We must perfect a plan for control of our present forms of organisation so as to harness the instruments of production not only for the ancient purpose of profit but also for the more slowly evolving purpose of service in the sense of the public good." It is interesting to find a judge of the U.S. Supreme Court echoing the words of Mr. Mackenzie King [6] in Canada, and Lord Eustace Percy,[7] Mr. Goyder [8] and a number of Socialist writers [9] in England. To some extent, indeed, the S.E.C. Statutes transcend the disclosure philosophy; as Mr. Loss points out (at pp. 175–8) in exercise of the Commission's power to accelerate approval of a registration without waiting the full 20-day period, they have in fact evolved a sanction to secure the deletion of features in the issue of which they disapprove, although this has, as yet, stopped far short of passing on the economic merits. In England, the virtual monopoly of new issues now enjoyed by a few issuing houses of high standing, which dare not forfeit their reputations by backing an unsound scheme, has, in practice, probably gone even farther.

But while it may be that the S.E.C. practices are unlikely to teach us much of immediate practical value so far as new issues are concerned, it is clear that in other respects we can learn valuable lessons from their experience. The following matters would seem to be particularly worthy of consideration when the next Company Law Amendment Committee is set up, and one of the most useful features of Mr. Loss' book, so far as this country is concerned, is that it makes the American material readily accessible to the English reformer.

(1) *Debenture Trust Deeds.* The Trust Indenture Act, described at pp. 417–446, seems to have gone some way towards making trustees for debenture-holders really active supervisors instead of agencies which perform a largely mechanical book-keeping role until prodded into activity by the debenture-holders. In England, both the legal provisions of the Companies Act and the rules of the London Stock Exchange seem perfunctory in comparison. The Cohen Committee in fact expressed dissatisfaction on this score and

[6] *Industry and Humanity* (Boston, 1918), and *The Four Parties to Industry* (Toronto, 1919).
[7] *The Unknown State*, Chap. 3, Sect. 2 (London, 1944).
[8] *The Future of Private Enterprise* (Oxford, 1951).
[9] G. D H. Cole, in the *New Statesman*, May 12, 1951. and Albu and Hewitt, *The Anatomy of Private Industry* (Fabian Research Series, No. 145).

agreed that "the use of the term 'trustee' may well lead the debenture holder to the belief that he is getting more effective protection than is the fact,"[10] but beyond barring indemnity provisions[11] they did nothing about it. The rules of the London Stock Exchange admittedly go somewhat farther but contain nothing comparable to the American provisions for periodical reports by both the trustees and the companies.

(2) *Reconstructions.* Under Chapter X of the Bankruptcy Act the S.E.C. act as impartial representatives of investors and expert advisers to the courts in connection with the approval of schemes of arrangement (pp. 449–452). There can be little doubt that there is a pressing need for some similar agency in this country. The Companies Act contains a number of provisions whereby the approval of the court is or may be required.[12] English procedure, however, is singularly ill-equipped to place a judge in a position properly to pass judgment on the economic merits of a scheme and to make the valuations necessary before he can do so. Hence, in most cases, courts do little more than satisfy themselves that all the statutory formalities have been complied with[13] and then act as a rubber-stamp, salving their consciences by explaining that "the members and creditors are much better judges of what is their commercial advantage than the court can be."[14] This clearly was not the intention of the legislature which, more realistically, recognised that members are generally clay in the hands of their directors, and therefore provided for the court's scrutiny to protect them from their own apathy or stupidity. This protection having inevitably proved unsatisfactory, what is wanted, clearly, is some agency which will enable the court adequately to fulfil an unfamiliar inquisitorial role. In the States this agency has been found in the S.E.C. Whether the Board of Trade would be prepared to play a similar role is doubtful; there seems to be no good reason why it should not, for if its own resources are inadequate it could appoint an outside expert as it habitually does when ordering an inspection. Alternatively we might take a leaf out of Scotland's book and provide for direct reference by the court to an outside expert; this was recently done by the Court of Session on an application for reduction of capital under section 66.[15]

(3) *Control.* Mr. Loss has an interesting chapter (Chapter VII) on "Control" Concepts under the S.E.C. Statutes. The problem of adequately defining what constitutes control of a company is

[10] Cmd. 6659/45, para 61.
[11] *Ibid.*, para. 64, and Companies Act, 1948, s. 88.
[12] *Ibid.*, ss. 5, 23, 57, 66–8, 72 and 206–9
[13] In ensuring that full and adequate disclosure has been made, this, of course, fulfils a useful purpose.
[14] *Per* Lindley L.J. in *Re English Scottish and Australian Bank* [1893] 3 Ch 385, at p. 409. For a recent example of this philosophy see *Re Press Caps* [1949] Ch. 434 (C.A.).
[15] See *Ex p. Westburn Sugar Refineries* [1951] A.C. 625.

one which has exercised the minds of draftsmen in this country—for purposes of both company and revenue law.[16] The definition in section 154 of the Companies Act is clearly not the last word, for it excludes from *de jure* control many situations in which *de facto* control is undoubtedly present. The definitions in the S.E.C. statutes and the judicial gloss placed on them go considerably farther than either the legislature or the courts have ventured in this country. For example, under the Investment Company Act a 25 per cent. holding of voting securities raises a presumption of control, while under the Holding Companies Act the percentage is as low as 10. Our Revenue and Board of Trade might profitably study the American practice.

(4) *Proxy Votes.* The Cohen Committee tried to increase the power of members over management by provisions regarding proxies,[17] but it can hardly be denied that while the management control the proxy-voting machinery their position is generally impregnable, and that the London Stock Exchange's requirement of "two-way" proxies has done little to weaken their hold. The S.E.C. Statutes and Regulations, on the other hand, appear to have gone some way towards making proxy voting an effective weapon in the shareholders' armoury instead of a shield for the directors. Not only are the proxy forms and circulars subject to rigorous control, but proxies must not be solicited until after a proxy statement (rather like a prospectus) has been filed, and approved, after scrutiny, by the Commission. These requirements in fact transcend the ordinary "disclosure philosophy" for, it seems, they tend to produce minimal standards of conduct for managements which are forced to bear in mind that their transactions will be brought into the light of public scrutiny in their next proxy statement. The rules also go considerably farther than our section 140 regarding the circulation of opposition motions and supporting material. If the management intend to solicit proxies they must on request furnish *any* shareholder entitled to vote with a list of shareholders or mail his material for him at his expense. This is similar to section 140 with the important distinction that the English shareholder has first to muster the support of one-twentieth of the voting rights or 100 members. Moreover, and this has no parallel in England, a shareholder unwilling to incur the expense of proxy solicitation can require the management to include his proposal in their own statement, giving, if they oppose it, the proposer's name and address and a statement of not more than 100 words of the reasons advanced by him in support of the proposal.

Mr. Loss' detailed account of these matters (at pp. 521–560) merits the closest attention. Whether it is either practical or

[16] For a brief account see Hornsey, *Some Aspects of the Law Relating to Company Control* (1950) 13 M.L.R. 470.
[17] Companies Act, 1948, ss. 136 and 137 (2).

desirable to introduce anything so elaborate into this country is questionable—it would scarcely be workable without a considerable expansion of the powers of the Board of Trade or the stock exchanges. Perhaps the feature which could most profitably be borrowed is that of a delay between the initial publication of the managements' proposals and the soliciting of proxies. The basic weakness of our present system is that before any opposition can be organised and expressed the management have generally received sufficient proxies in response to their circular to make their victory virtually assured.[18] It would be easy for the legislature to enact, or for the stock exchanges to insist, that proxies should not be solicited until the lapse of a prescribed period from the dispatch of notices, so that the financial press could have an opportunity to comment on the proposals and any opposition could organise itself. It would be even better to require that certain types of resolutions should need to be passed on a postal ballot and that voting papers should not be dispatched until after a meeting had been held and the proposals discussed. If this were done, meetings would produce a genuine debate instead of the present farce in which a handful of opposing orators harangue a complacent management secure in the knowledge that nothing that is said or left unsaid can affect the result. This proposal is unlikely to commend itself to commercial magnates or perhaps to be introduced by the stock exchanges on their own initiative, but if we are seriously determined to make managements the servants of members something of the sort seems essential. But are we serious? A strong argument could be raised to the effect that any efforts in this direction represent attempts to put the clock back, and that the time has come to recognise frankly that shareholders are merely lenders of capital and entitled to no more control over their debtors than any other creditors.

(5) *Share Dealings by Directors.* Since the calamitous decision in *Percival* v. *Wright*[19] it seems to have been assumed in this country that directors have, legally, *carte blanche* to put to personal advantage their inside information in dealings in their companies' securities. Most jurisdictions in the U.S.A. seem to have started from the same principle, that a director as such is not in any fiduciary relationship with members of the company but only with the company itself. Even at common law, however, they have, in practice, curtailed the director's licence by ruling that additional facts may easily convert a director into a quasi-trustee for the members: Mr. Loss gives an excellent account of this process at pp. 824 *et seq.* There is more judicial authority than is generally

[18] It would, of course, be possible for the members to withdraw their proxies but this rarely happens; investors are too proud to admit that they have made a mistake.

[19] [1902] 2 Ch. 421.

realised for a similar development in this country.[20] Moreover, *Percival* v. *Wright* is no authority on the position as between the director and the company, and the present writer has long held the view that agency principles are sufficiently elastic to enable the company to recover from the director any profit which he has made on share dealings as a result of the misuse of confidential information. In England no company has yet had the temerity to make such a claim, but one has successfully done so in the States.[21] In these respects the American material will be invaluable when similar questions come to be litigated and it is to be hoped that it will be used. Indeed, one may here comment generally on the astonishing failure of English practitioners to explore the American case law when novel points of company law are litigated; their case law (and, for that matter, their legal literature) is far richer than the English, but how rarely is it cited in the Companies Court.

The American common law developments, however, pale into insignificance compared with the regulations made under the S.E.C. Statutes. A director or other "insider"[22] is subject to attack from many sides.[23] He has to make an initial report of his holdings and to notify all changes, and these reports are available for public inspection both at the Commission and at the stock exchange (p. 562); this alone goes considerably farther than the English requirement of a register of directors' shareholdings which is only open to inspection by the Board of Trade, and, for a limited period, by members and debenture-holders.[24] Moreover, he has to account to the company for any profit made by a purchase and sale (or vice versa) within six months of each other and this irrespective of any actual abuse of his position (pp. 568–580). Mr. Loss says that this "is probably the most cordially disliked provision in all these statutes from the point of view of those whom it affects"[25] and one can well believe it. On the other hand it seems to have been remarkably effective, doubtless because any share or debenture-holder may maintain an action on behalf of the company, thus precluding the offender from sheltering behind the difficulties of a representative action and the rule in *Foss* v. *Harbottle*.

Nor is this all. Under a Rule of the Commission an "insider"[26]

[20] *Allen* v. *Hyatt* (1914) 80 T.L.R. 444 (J.C.).

[21] *Brophy* v. *Cities Service Co.*, a decision of the Chancery Court of Delaware (a state not noted for its strictness towards company promoters) noted by Mr. Loss at pp. 594–5 and commented on in (1950) 63 Harv.L.R. 1446.

[22] The regulations cover every officer, director and every person "who is directly or indirectly the beneficial owner of more than 10 per cent. of any class of any equity security" registered with the Commission.

[23] In addition to those mentioned in the text there is an absolute prohibition on selling "short": pp. 580–1.

[24] Companies Act, 1948, s. 195.

[25] p. 578.

[26] For this purpose the definition of "insider" seems to be even wider and to include anyone whose position has enabled him to acquire confidential information: see pp. 828–31.

is under a duty to make full disclosure of material facts when he buys or sells securities (pp. 827–844). If he does not, the other party has the usual remedies for fraud. As Mr. Loss points out (at p. 844) the apparent result of this and the former provisions is that an "insider" who makes a short-term profit may be subject to a double liability: to compensate the seller under this rule (and perhaps the buyer also?) and to account to the company for his short-lived profit. This is spoiling the Egyptians with a vengeance.[27]

These provisions of the S.E.C. Statutes have recently been given favourable publicity in the financial columns of some London newspapers. Sweeping though they are, they represent a serious and effective attempt to eradicate practices which no longer accord even with the somewhat elastic notions of commercial morality. Our law (at any rate as at present understood) is seriously out of step with public feeling. This was recognised by the Cohen Committee, but the registration of directors' shareholdings, which was all that finally resulted from their deliberations, was but a halting and inadequate step towards a remedy. In any future measure of reform the S.E.C. solution will clearly require serious consideration. If it be objected that such stringent provisions would discourage directors from holding any shares in their companies, the answers are: first, that it does not seem to have had this effect in the States, where, on the whole, directors appear to retain far greater stakes in their companies than in England, and secondly, that perhaps this would in any case be the lesser of two evils, if an evil at all. Shareholdings by directors are only valuable from the point of view of the company and other members if they are really substantial. In England today this is rarely the case with large public companies, and the financial incentives which cause directors to give of their best are their salaries and commissions rather than their holdings. The requirement of the London Stock Exchange that directors shall have a share qualification which is not merely nominal is in practice satisfied by a holding of as little as £100,[28] and this is just a nuisance to all concerned. Since economic conditions generally preclude the holding of a worth-while interest in the capital, there seems to be no reason why we should not concentrate on stopping the still prevalent practice of using inside information in gambles on the stock exchange, without bothering about the divorce between management and members, for that divorce is already absolute.

A more powerful objection is that unless nominee shareholdings are eradicated, which, it will be remembered, has hitherto been rejected as impracticable, share-dealings by "insiders" will escape detection. This argument presupposes that every director who is

[27] Any reader who is fortunate enough to be an English "insider" may be pleased to know that as yet no one has paid this supreme penalty.

[28] And this may be held as nominee for someone else!

prepared to earn a little on the side is also willing to tell a formal and deliberate lie for which he is liable to a fine—at present admittedly ridiculously small.[29] Moreover, it may be assumed that the reputable nominee companies would not be willing to lend themselves to an infringement, especially if they themselves were made liable,[30] and a director who operated through a disreputable nominee would be laying himself wide open to denunciation or blackmail. But even if some offenders escaped detection, the mere presence on the Statute-book (or, for that matter, in the stock exchange rules) of such powerful sanctions would have a valuable deterrent effect and, it may be assumed, even one successful action would cause many actual or potential sinners to see the light.

(6) *Civil Liabilities.* Mr. Loss has a long and absorbing Chapter (Chap. XIII) on the subject of civil liabilities generally, both at common law, under the States "blue-skies" laws, and under the S.E.C. Statutes. It will have been apparent from the foregoing that these liabilities are much more extensive than in England, but Mr. Loss comments (p. 988) on the relative paucity of civil actions for misrepresentation, accounted for, in his opinion, by the efficiency of the Commission's scrutiny of registration statements.[31] Perhaps the most interesting feature of the American scene from our point of view is the readiness with which the courts have held that breach of a statutory duty gives rise to civil liability towards an investor damnified thereby even although no civil remedy is expressly provided (pp. 1048–1071). There is obviously wide scope for a similar development in England in respect of breaches of the Companies Act and the Prevention of Fraud Act, but as yet we have scarcely started.[32] Here again the American material will be a valuable persuasive authority if and when we make a move. American law also seems much more ready to grant rescission as an alternative to damages; the English practice (as represented by section 43 of the Companies Act) is to restrict claims so far as possible to damages against the individual wrongdoers instead of granting a remedy against the company. The justification for our practice is that it protects creditors of the company; as Mr. Loss (p. 1111) points out, America has never wholeheartedly adopted the English and Continental conception of capital as a "trust fund" for the benefit of creditors. It is also clear that American law protects not only original subscribers but also those who purchase on the market in reliance on the prospectus

[29] £50: s. 198.

[30] Under the S.E.C. Rule even a broker who knows or suspects that he is acting for an "insider" may be liable to compensate the other party if disclosure is not made (see p. 839).

[31] In England the similar scrutiny by the issuing houses doubtless accounts for a similar dearth of recent decisions.

[32] *Cf. Re South of England Natural Gas Co.* [1911] 1 Ch. 573, and *Nash* v. *Lynde* [1929] A.C. 158.

statement. The English position in this respect is not too clear. Actions under section 48 are clearly limited to original subscribers, or those who acquire from an issuing house under an offer for sale (section 45). As regards common law fraud, *Peek* v. *Gurney* [33] is generally taken as authority for the proposition that there is normally no liability towards market purchasers, although *Andrewes* v. *Mockford* [34] recognises that this does not apply when the prospectus is intended to influence such purchases. It may be suggested, however, that under modern conditions the latter case represents the rule to which *Peek* v. *Gurney* is the exception. Since the prospectus will be published as an advertisement to lead to the grant of a stock exchange quotation, how can the issuers say that they did not intend it to influence purchasers on the market? They can hardly deny that they knew that it was likely to be relied on by such purchasers and they must be deemed to have intended the natural consequences of their acts whether they wished them or not. Here again the American authorities may one day prove valuable to the English advocate.

This account, although over-long for a book review, has only touched on some of the matters dealt with in Mr. Loss' fascinating work which are of particular interest to the writer. Little or no reference has been made to the detailed accounts of the control exercised over stock-brokers and dealers (jobbers) and investment advisers, or to the measures designed to prevent market manipulation; those more familiar with the seamier side of stock-broking and share-pushing must be left to comment on this aspect of the work. As, however, reference has been made to the contrast between England's reliance on extra-legal techniques and private agencies and the American resort to State control, attention should be drawn to an experiment in co-operation between S.E.C. and a representative association of brokers and dealers—the National Association of Securities Dealers Inc. (N.A.S.D.)—which approaches much more closely to the English solution exemplified in the co-operation between the Board of Trade and the stock exchanges.[35]

Nor has anything been said of the final chapter, which explains the Commission's organisation and procedure, and which will undoubtedly interest constitutional and administrative lawyers. It will have been apparent that the Commission's rule-making and judicial powers are far greater than those exercised by the Board of Trade or any other body in the English commercial sphere. The only respect in which the Board has greater powers concerns inspections, and this is very much a *tabula in naufragio* so far as investor protection is concerned. The Commission is, however, subject to a

[33] (1873) L.R. 6 H.L. 377.
[34] [1896] 1 Q.B. 372 (C.A.).
[35] *Cf.* Companies Act, 1948, s. 39.

much closer judicial review than that enjoyed (if that is the right word) by most English administrative agencies.

This inadequate account should, however, have indicated how much of interest to the English reader Mr. Loss' book contains. It is only regrettable that its price may prevent its having the circulation on this side of the Atlantic that it deserves.

L. C. B. GOWER.[36]

[36] Sir Ernest Cassel, Professor of Commercial Law in the University of London.

A RE-EXAMINATION OF REMOTENESS

RECENT dicta of the Court of Appeal in *Thorogood* v. *Van den Berghs and Jurgens, Ltd.*,[1] have reopened the thorny problem of remoteness of damage in tort. As leave to appeal to the House of Lords has been granted, this may be a convenient time to survey not only the conflicting theories on the test for remoteness of damage in tort, but also the corresponding liability in contract, since attempts have been made to link the two into one general principle. The object of the present paper is to trace the development of the remoteness rules in contract and tort, to establish that the contractual rule is based on foreseeability while the tortious rule is based on directness, and to show that on both authority and principle there is no connection between the two rules.

The question of assessing damages for breach of a legal duty, whether in contract or tort, depends upon the solution of three problems, each of which must be dealt with independently.

(*a*) Is there a breach of legal duty? This may consist of either a breach of contract or the commission of a tort. Until this question has been answered in the affirmative, all questions of remoteness of damage are irrelevant. This problem has never caused great difficulty in contract, but has been the source of much confusion in tort, and especially with reference to the tort of negligence. It is essential to decide at the outset whether a legal duty has been broken before discussing what damage has been caused by it. Lord Wright stresses this point in *Bourhill* v. *Young*.[2] 'The question of liability is anterior to the question of the measure of the consequences which go with the liability."[3]

(*b*) Secondly, in respect of what consequences of an established breach of duty can the injured party recover? This is simply an occasion for the application of the rules of remoteness of damage and it is the contention of the writers of this article that the same test is not applicable both to torts and to breaches of contract. Despite judicial dicta to the contrary, it is submitted that the test is one of "foreseeability" in contract, and one of "directness" in tort.

(*c*) Thirdly, how much compensation can the injured party recover for consequences of the breach of legal duty which have already been held to be not too remote? Only when

[1] [1951] 2 K.B. 537

[2] [1943] A.C. 92 at p. 487.

[3] See also *per* Lord Porter in *Woods* v. *Duncan* [1946] A.C. 401 at p. 437. "No question of measure of damages arises here. . . . Your Lordships are concerned with the earlier question whether these defendants were negligent."

a decision has been made as to what consequences are sufficiently proximate for compensation can the rules as to measure of damages be applied. Thus in the words of Lord Esher M.R. in *The Argentino*,[4] "This rule does not come into play with regard to any claimed head of damage until it has been determined by the rule as to remoteness whether that head of damage can be brought into consideration at all." It is generally agreed that the rules of contract and tort are at one in accepting the principle of *restitutio in integrum* as the basis of measure of damages, although in tort the principle is somewhat more difficult to apply in cases of personal physical injury.[5] Thus Scrutton L.J. remarks in *The Edison*,[6] "Speaking generally as to all wrongful acts whatever arising out of tort or breach of contract, the English law only adopts the principle of *restitutio in integrum*, subject to the qualification or restriction that the damages must not be too remote."

It is essential that these three questions should be answered separately and in the above order, for all too often in tort questions of remoteness are discussed before the breach of a legal duty has been established. The present intention is to examine the first two questions in relation to contract and tort, and, on the basis of the examination, to compare the respective rules as to remoteness of damage in the two branches of the law.

Contract

There are innumerable ways in which a contract may be broken, including express repudiation before or on the date when performance is due, implicit repudiation by non-performance, or by rendering performance impossible, or merely by breach of a condition or warranty. The court has to decide whether the conduct of the defendant amounts to a breach of contract, and it is not until it has answered this question that it considers what items of damage are not too remote for compensation, and applies the rule in *Hadley* v. *Baxendale*.[7] The fundamental division between these two problems has always been recognised in contract, and so we can immediately pass on to the test for remoteness of damage.

[4] (1888) 13 P. 191 at p. 196.

[5] Support for this proposition in relation to contract is found in *Wertheim* v. *Chicoutimi Pulp Co.* [1911] A.C. at p. 307, *per* Lord Atkinson; *British Westinghouse Electric Co.* v. *Underground Electric Rys.* [1912] A.C. at p. 689, *per* Lord Haldane; *Williams Bros* v. *Agius* [1914] A.C. at p. 522, *per* Lord Haldane; *Victoria Laundry (Windsor), Ltd.* v. *Newman Industries, Ltd.* [1949] 2 K.B. at p. 539, *per* Asquith L.J.; *Monarch SS Co.* v. *Karlshamns Oljefabriker* [1949] A.C. at p. 220, *per* Lord Wright. In relation to tort in *The Argentino* (1888) 13 P. at p. 200, *per* Bowen L.J.; *The Kate* (1899) P. at p. 162, *per* Sir F. Jeune.

[6] [1932] P. 52 at p. 62. See also *Admiralty Commissioners* v. *SS Susquehanna* [1926] A.C. at p. 661, *per* Lord Dunedin.

[7] (1854) 9 Exch. 341.

Damages recoverable, in the words of Alderson B., are "such as may fairly and reasonably be considered either arising naturally, *i.e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."[8]

This test has been consistently applied in all contract cases during the past century and there can now be no doubt as to its authority. It is submitted that the underlying idea is plain. Since contractual liability is self-imposed, the parties can only be liable for the damage for which they have agreed to be liable. In most cases the parties do not expressly provide for the consequences of a breach, and the court, therefore, has to infer the extent of the liability which each party has undertaken. It can thus include only those items of damage which the defendant, in the words of Bovill C.J., "could have foreseen and reasonably expected and to which he has assented expressly or impliedly by entering the contract."[9] This interpretation has not been universally accepted. It has been suggested that the parties to a contract contemplate only its performance and not the consequences of its breach, the liability for which is imposed by the court *ab extra*.[10] But, if, as is generally admitted, liability in contract is self-imposed this liability must surely extend to the obligation to pay damages for its breach no less than to its performance.

This, at least, is the interpretation suggested by the great majority of the decided cases, and in assessing the parties' foreknowledge and agreement as to damages, the courts apply both objective and subjective tests. The former is reflected by the so-called "first branch" of the rule in *Hadley* v. *Baxendale* under which a party is liable for all damage arising naturally from such breach of contract itself, *i.e.*, according to the usual course of things. This branch of the rule renders a man liable for no damages beyond what a reasonable man could have foreseen, but no concessions are made for the party who proves that his foresight is not equal to that of the reasonable man. In addition, however, the courts may consider under the second branch of the rule not what the reasonable man would have anticipated, but what damages those particular parties in those particular circumstances foresaw and impliedly agreed to bear; in short, all particular items are recoverable which may be supposed to have been in the contemplation of the two contracting parties at the time of the

[8] *Hadley* v. *Baxendale* (1854) 9 Exch. 341 at p. 354.
[9] *British Columbia Saw-Mill Co., Ltd.* v. *Nettleship* (1868) L.R. 8 C.P. at p. 506. See also *Horne* v. *Midland Ry.* (1873) L.R. 8 C.P. 131 at p. 141, *per* Blackburn J.
[10] *Hydraulic Engineering Co.* v. *McHaffie* (1878) 4 Q.B.D. 670 at p. 674, *per* Bramwell L.J., at p. 677, *per* Cotton L.J.

contract. Asquith L.J. summarises the law in regard to remoteness of damage in contract in his judgment in the recent case of *Victoria Laundry (Windsor), Ltd.* v. *Newman Industries, Ltd.*[11]

"In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as likely to result from the breach.

"What was at that time reasonably so foreseeable depends on the knowledge then possessed by the parties or, at all events, by the party who later commits the breach.

"For this purpose, knowledge 'possessed' is of two kinds; one imputed, the other actual. Everyone, as a reasonable person, is taken to know the 'ordinary course of things' and, consequently, what loss is liable to result from a breach of contract in that ordinary course. This is the breach of contract in that ordinary course. This is the subject-matter of the 'first rule' in *Hadley* v. *Baxendale*. But to this knowledge, which a contract-breaker is assumed to possess whether he actually possesses it or not, there may have to be added in a particular case knowledge which he actually possesses, of special circumstances outside the 'ordinary course of things,' of such a kind that a breach in those special circumstances would be liable to cause more loss. Such a case attracts the operation of the 'second rule' so as to make additional loss also recoverable."

This passage neatly illustrates the subjective and objective tests of knowledge applied by the court, but must be read subject to the rider, mentioned by Asquith L.J.,[12] that even actual knowledge of potential damage as a result of breach is not sufficient unless the defendant has agreed to bear it. So *per* Willes J. in *British Columbia Saw-Mills Co.* v. *Nettleship*, "the mere fact of knowledgment cannot increase the liability. The knowledge must be brought home to the party sought to be charged, under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it."[13]

No decision is at variance with this dictum, which has been constantly quoted with approval,[14] and indeed, it is submitted, lends added weight to the principle of agreement above enunciated.

If this statement of principle be correct, it is hardly surprising that there has never been any suggestion in cases of contract that

[11] [1949] 2 K.B. 528 at p. 539. Tucker and Singleton L.JJ. concurred in this judgment. See also *British Columbia Saw-Mills Co.* v. *Nettleship* (1868) L.R. 3 C.P. at p. 506, *per* Bovill C.J., *Patrick* v. *Russo-British Grain Export Co.* [1927] 2 K.B. at p. 538, *per* Salter J. It is also implicit in all the judgments in *Simpson* v. *L. N. W. Ry.* (1876) 1 Q.B.D. 274.

[12] At p. 536.

[13] (1868) L.R. 3 C.P. 499 at p. 509.

[14] See *Horne* v. *Midland Ry.* (1873) L.R. 8 C.P. 131 at pp. 133, 134, 139, *per* Martin B. at p. 141, *per* Blackburn J.; *Patrick* v. *Russo-British Grain Export Co.* [1927] 2 K.B. 535 at p. 540, *per* Salter J. See also note (13), *supra*.

the defaulting party can be made liable for direct consequences beyond those foreseeable by a reasonable man or by the parties themselves. The rigid application of the foreseeability test is also well illustrated by decided cases. From these it appears that the value of a broken promise is not its actual value to the promisee, but the value which a reasonable man, with the promisor's knowledge, would have estimated it to have. Thus the actual value of an article lost under a contract of carriage is not recoverable where it is unknown to the defendant,[15] nor the actual damage caused by the late delivery of the crankshaft in *Hadley* v. *Baxendale*. Again, damage caused by the loss of forward sales is irrecoverable where not known to the promisor.[16] Even where the promisor knows that a resale is intended, he will only be liable for a reasonable profit and not the actual profit, unless he is aware of the details of such resale.[17] So rigidly is the foreseeability test applied that damages for foreseeable loss can be recovered although such loss has been reduced by a forward sale at a price below the market price,[18] and even though no loss of the type foreseen has occurred.[19]

A study of these cases inevitably leads to the conclusion that the test in contract for deciding what damage is sufficiently proximate to the breach is based purely on foreseeability. The value of the broken promise is not its value to the party who desires its fulfilment, but its value to a reasonable man having the same actual knowledge of surrounding circumstances as the promisor. This basis of liability is only explicable on the footing that a party to a contract is not liable for loss beyond what he has contracted to bear. He can state his liability expressly, as in *Dunlop* v. *New Garage Co.*,[20] but in most cases the courts have to imply this agreement, and will accordingly render him liable for no damage beyond that which he could have foreseen.

TORT

In tort, no less than in contract, it is essential to keep distinct the three questions above postulated and to answer them in the correct order.

1. Has the defendant committed a breach of a legal duty, *i.e.*, has he committed a tort towards the plaintiff?

2. For what heads of damage resulting from this tort may the plaintiff recover?

How shall this damage be assessed in terms of money?

...mbia Saw-Mill Co. v. *Nettleship* (1868) L.R. 3 C.P. 499. *Cf. ...nsering Co.* v. *MacHaffie* (1878) 4 Q.B.D. 670.
...Ry. (1873) L.R. 8 C.P. 181. *The Arpad* [1934] P. 189.
...Ltd. v. *Cosmos Exporters, Ltd.* [1947] K.B. 217. See *(Windsor), Ltd.* v. *Newman Industries, Ltd.* [1949]
...914] A.C. 510.
...*rks* (1868) L.R. 3 Q.B. 181.

The third question does not fall within the compass of the present article, but an attempt will be made to answer the first two questions.

1. Little difficulty has been experienced by the courts in determining whether a tort has been committed in cases of so-called "strict liability" where the defendant's foresight or state of mind is irrelevant. Under this heading are to be found such torts as libel, trespass, and conversion, liability for fire and the keeping of dangerous animals, and liability under the *Rylands* v. *Fletcher* principle. In such cases there is little temptation to confuse questions of liability and remoteness of damage, for the courts merely look at the act and not at the damage.

In contrast, however, a second class of tort exists in which the defendant's foresight of the consequences is an essential feature of the tort. The liability of occupiers for dangerous premises, liability for injurious falsehood and nuisance fall within this category, but foremost in the list comes the liability for negligence. The cases on the subject of remoteness of damage quoted by academic writers are almost exclusively drawn from the tort of negligence, and well illustrate the vital need in this sphere of distinguishing questions of liability from questions of remoteness. This distinction was recognised by the Court of Appeal in *Hambrook* v. *Stokes*,[21] for the court confined itself to a discussion of the extent of the defendant's duty of care, and the dissenting judgment of Sargent L.J. is based simply on disagreement as to the extent of that duty.[22] Again, in *Bourhill* v. *Young*,[23] the court confined itself to the question of whether a duty of care was owed to the fishwife, and did not discuss whether the damage to her was the direct consequence of the defendant's act. In the words of Lord Wright, "the question of liability is anterior to the question of the measure of the consequences which go with the liability."[24]

The present argument can be summed up in the words of Greer L.J. in *Haynes* v. *Harwood*.[25] "Negligence in the air will not do; negligence, in order to give a cause of action, must be the neglect of some duty owed to the person who makes the claim." It is clear, therefore, that if it is desired to hold the defendant liable for damage caused by his act or omission, it is essential first to establish that his act or omission constitutes a tort towards the plaintiff, and this is true of negligence as of other torts. Thus, to accept the suggestion of Denning L.J.[26] that the decisions in

[21] [1925] 1 K.B. 141.
[22] *Ibid.* at p. 162. See also *per* Atkin L.J. at p. 158.
[23] [1943] A.C. 92.
[24] *Ibid.* at p. 109. See other dicta to the same effect, *per* Lord Wright at p. 108, *per* Lord Porter at pp. 116–7, *per* Lord Russell at p. 101.
[25] [1935] 1 K.B. 146 at p. 152. See also *Woods* v. *Duncan* [1946] A.C. 401 at p. 437, *per* Lord Porter.
[26] *Minister of Pensions* v. *Chennell* [1945] 2 All E.R. 719 at p. 721.

the *Palsgraf Case*,[27] *Bourhill* v. *Young* and *Woods* v. *Duncan*, have in any way affected the rules as to remoteness of damage, is to overlook the fact that in none of these cases could the plaintiff establish a tort committed towards himself.

2. When the breach of a legal duty has been established, the next step is to decide for what consequences of the breach the plaintiff can recover. Here, opinion is sharply divided between the view that the defendant should not be liable for consequences beyond those which he could foresee, and the view expressed in *Re Polemis*[28] that, "if the act would or might probably cause damage, the fact that the damage it in fact causes is not the exact kind of damage one would expect is immaterial, so long as the damage is in fact directly traceable to the negligent act." It will be seen that the first-mentioned test corresponds almost exactly with the rules as to remoteness of damage in contract laid down in *Hadley* v. *Baxendale*, and in consequence it has all too often been suggested that the rules in contract and tort are, in fact, the same.[29] Yet this view of the rule in tort remains based on certain dicta in nineteenth-century cases, while the totally different "directness" test propounded in *Re Polemis* finds continual support in modern cases, and even in those cases which are alleged to have thrown doubt upon its validity.[30] Lord Wright goes so far as to suggest that *Re Polemis* only reiterates existing law,[31] while the recent decision of the Court of Appeal in *Thorogood* v. *Van den Berghs and Jurgens, Ltd.*,[32] has lent added weight to the much criticised rule.

It is the submission of the present writers that the *Polemis Case* laid down the clearly correct rule for deciding questions of remoteness in tort, and that it is to be hoped that the essential distinction between questions of remoteness in contract and tort will at length be recognised by the House of Lords. The principle has been criticised on two main grounds:—

(a) It is said that it is inconsistent with previous authorities.

It has been suggested that the "directness" test is an innovation appearing for the first time in 1870 in the case of *Smith* v. *L. & S. W. Ry.*[33] This suggestion is in fact unfounded, for before this

[27] (1928) 248 N.Y. 339.
[28] [1921] 3 K.B. 560 at p. 577, *per* Scrutton L.J.
[29] *The Notting Hill* (1884) 9 P. at p. 118, *per* Brett M.R.; *per* Bowen L.J. in *The Argentino* (1888) 13 P. at p. 200, and in *Cobb* v. *G. W. Ry.* [1893] 1 Q.B. at p. 464; *per* Greer L.J. in *The Edison* [1932] P. at p. 68, in *The Arpad* [1934] P. at p. 216, and in *Haynes* v. *Harwood* [1935] 1 K.B. at p. 156.
[30] *Hambrook* v. *Stokes* [1925] 1 K.B. at p. 156, *per* Atkin L.J.; *G. W. Ry.* v. *Mostyn* [1928] A.C. at p. 91, *per* Lord Phillimore; *The Arpad* [1934] P. at p. 232, *per* Maugham L.J.; *Re Simms* [1934] Ch. at p. 7, *per* Lord Hanworth M.R.; *Woods* v. *Duncan* [1946] A.C. at p. 407, *per* Lord Porter; *Liesbosch Dredger* v. *Edison* [1933] A.C. at p. 461, *per* Lord Wright; *Morrison SS. Co.* v *Greystoke Castle* [1947] A.C. at p. 296, *per* Lord Roche.
[31] *Bourhill* v. *Young* [1943] A.C. at p. 109.
[32] [1951] 2 K.B. 537.
[33] (1871) L.R. 6 C.P. 14.

date defendants had been held liable for damage which they could not have foreseen in cases of trespass, and many other instances of strict liability. Thus, in *Lee* v. *Riley* [34] the owner of a trespassing horse was expressly held liable for the direct consequences of the trespass even though they were not foreseeable, and this decision was followed in similar circumstances in *Ellis* v. *Loftus Iron Co.*[35] So *per* Lord Coleridge C.J.: "The only remaining question is whether the damages were too remote. I cannot see that they were; they were the natural and direct consequence of the trespass committed. . . . *Lee* v. *Riley* is a very strong authority for our present decision." [36]

In contradistinction to the torts of strict liability, however, negligence only emerged clearly as an independent tort in 1888 in *Heaven* v. *Pender*,[37] and did not become firmly established until *Donoghue* v. *Stevenson*.[38] It is not surprising that while the limitations of the tort were very vague there was also an absence of authority with regard to the question of the extent of the damage recoverable under it. There is a natural tendency in such cases to argue that, since no tort has been committed unless the defendant could foresee damage to the plaintiff as the result of his act or omission, the defendant could not be liable for damage beyond that which he could foresee. Certain obiter dicta of Pollock C.B. in *Rigby* v. *Hewitt* [39] and *Greenland* v. *Chaplin* [40] supported this view, but they were the only authorities in support of it at the time, and it is clear that the other members of the court in these two cases disagreed with them. The present submission is, therefore, that the court in *Smith* v. *L. & S. W. Ry.* were merely applying an already well-established general principle of liability in tort to the newly emerging tort of negligence.

It is true that certain dicta of three judges in *Smith* v. *L. & S. W. Ry.* went far towards suggesting that the defendants would have been liable for the destruction of the cottage even though they could have foreseen no damage to it. Thus, Kelly C.B. said: "It may be that they did not anticipate, and were not bound to anticipate, that the plaintiff's cottage would be burnt as a result of their negligence; but I think the law is, that if they were aware that these heaps were lying by the side of the rails, and that it was a hot season, and that therefore by being left there the heaps were likely to catch fire, the defendants were bound to provide against all circumstances which might result from this, and were responsible for all the natural consequences of it." [41] Such dicta

[34] (1865) 18 C.B.(N.S.) 722.
[35] (1874) L.R. 10 C.P. 10.
[36] *Ibid.* at p. 12.
[37] (1883) 11 Q.B.D. 503.
[38] [1932] A.C. 562.
[39] (1850) 5 Ex. at p. 248.
[40] (1850) 5 Ex. at p. 248.
[41] (1871) L.R. 6 C.P. at p. 20.

are clearly too broad if applied simply to the tort of negligence; but it must be remembered that in this case the defendant could foresee the consequence of fire arising from his act, and the old common law rule was that once a fire had been negligently started or allowed to spread, the negligent party was absolutely liable for the damage it caused.[43] It may well be that the judges in this case had the common law liability for fire in mind when making these much criticised dicta, a fact which goes far to explain why subsequent applications of the dicta have been confined to cases where the defendant could have foreseen some damage to the plaintiff's property.

Two other cases are often cited as being in conflict with the *Polemis* rule, of which one is *Sharp* v. *Powell*.[43] Here, it is argued that the injury to the plaintiff's horse was a direct consequence of the defendant's breach of a police regulation, and therefore that the decision conflicts with *Smith* v. *L. & S. W. Ry.* On investigating the case, however, it seems clear that all judges are agreed that it is not the direct consequence, due to a break in the chain of causation. So *per* Grove J.: "It does not by any means follow that, though the act of allowing the water to flow over the street in the first instance was wrongful, the defendant is liable for a stoppage occurring after the water had got back into its proper and accustomed channel."[44] All judges agree that once the water had returned to its proper channel, the wrongful conduct of the defendant is at an end, and no further damage, on the facts of this case, can be said to have been caused directly by the breach of the police regulation.[45] The court holds the damage to have been caused by the stoppage of a drain, and proceeds to decide the case on the principles of negligence.[46] The decision, therefore, does not in any way conflict with that in *Smith* v. *L. & S. W. Ry.* since the court holds first that the damage was not the direct consequence of the original unlawful act, and secondly, that the defendant was not negligent with regard to the object actually causing the damage.

Another case which caused much difficulty to Pollock in his treatise on the law of torts is that of *Cox* v. *Burbidge*,[47] a case of cattle trespass. It may here be noted in passing, that both this case and that of *Sharp* v. *Powell* are not cases brought in negligence, and the fact that learned writers find difficulty in reconciling them with the *Polemis* rule impliedly supports the present contention that the same principles of remoteness apply to all torts. In this case the offending animal, while trespassing on

[43] *Fulliter* v. *Phippard* (1847) 11 Q.B. 347; *Musgrove* v *Pandelis* [1919] 2 K.B. 43 at p. 47, *per* Bankes L.J. at p. 51, *per* Duke L.J.
[43] (1872) L.R. 7 C.P. 253.
[44] *Ibid.*, p. 260.
[45] *Ibid.*, p. 256, *per* Bovill C.J., p. 260, *per* Keating J.
[46] *Ibid.*, p. 259, *per* Grove J.
[47] (1868) 18 C.B.(N.S.) 430.

the road, kicked a child. As the court expressly negatives the presence of scienter, there is no point in further discussion of that heading of liability. It has been argued, however, that the child should recover since the injury to him was the direct consequence of the trespass, but the simple answer is that the child cannot satisfy the primary requirement of a tort committed towards himself. The trespass of the horse is a tort committed against the land-owner, but, in the absence of scienter, the child has no cause of action. This point is clearly taken by Erle C.J.: "As between the owner of the horse and the owner of the soil of the highway or the herbage growing thereon, we may assume that the horse was trespassing; and, if the horse had done any damage to the soil, the owner of the soil might have had a right of action against his owner. . . . But, in considering the claim of the plaintiff against the defendant for the injury sustained from the kick, the question whether the horse was a trespasser as against the owner of the soil, or whether his owner was amenable under the Highway Act, has nothing to do with the case of the plaintiff."[48] The answer surely is, as in *Bourhill* v. *Young*, that the question of remoteness of damage is irrelevant until it has been established that a tort has been committed towards the plaintiff.

(b) The second criticism of the *Polemis* rule is a theoretical one. Professor Goodhart argues that an act can only be negligent as regards those specific consequences which can be foreseen, and thus it is impossible to talk of consequences flowing from a negligent act.[49] Thus, he argues that if a man can foresee consequence A as the result of his conduct, but not consequence B, then he is negligent as to consequence A but not as to consequence B.

This view has been much discussed and it is proposed to make only two comments on it. First, though it appeals to the reason, it seems to be based on very scant authority. It is difficult in a negligence case to make the defendant liable piecemeal, and there seems little authority for this subdivision into various categories of damage. The test for liability in a running down case is surely whether the driver could foresee general damage to the plaintiff, and not whether he could foresee damage to the plaintiff's leg as distinct from his arm. In the words of Atkin L.J. in *Hambrook* v. *Stokes*,[50] "The duty of the owner of a motor car in a highway is not a duty to refrain from inflicting a particular kind of injury upon those who are in the highway. If so he would be an insurer. It is a duty to use reasonable care to avoid injuring those using the highway."

Secondly, and this is a point which seems to have been bypassed, this criticism really relates to liability and not to remoteness of damage. The suggestion in the example quoted above, is that

[48] *Ibid.* at p. 485.
[49] See *Essays in Jurisprudence and the Common Law*, pp. 118, 129.
[50] [1925] 1 K.B. 141 at p. 156.

the man escapes liability for consequence B, not because it is too remote, but because, in causing that damage, he has broken no duty and committed no tort. To determine liability for negligence, one looks not so much at the act or omission as at the damage which ensues; if one act causes several foreseeable types of damage to the plaintiff the doer has committed several torts against him by that act. This test, it is submitted, is unworkable; but even if it is correct, it does not affect the present argument which concerns remoteness and not liability. On this hypothesis, in the tort of negligence, questions of remoteness can never arise.

It is submitted, therefore, that despite any criticism, the test of directness established in *Smith* v. *L. & S. W. Ry.*, and approved by the court in *Sneesby* v. *Lancashire and Yorkshire Ry.*[51] and in *H.M.S. London*,[52] is the correct one. Lord Sumner in *Weld-Blundell* v. *Stephens* [53] followed the rule with the celebrated dictum: "What a defendant ought to have anticipated as a reasonable man is material when the question is whether or not he was guilty of negligence, that is, want of due care according to the circumstances. This, however, goes to culpability not to compensation." So well established is the principle that Bankes L.J. in *Re Polemis* [54] reveals that even junior counsel "admitted that it could not lie in the mouth of a person whose negligent act had caused damage to say that he could not reasonably have foreseen the extent of the damage."

The truth of the matter, in the present writers' submission, is that the *Polemis* test is the correct one, and that any test of remoteness depending upon foreseeability is unworkable. Four arguments may be put forward in support of this view:—

(a) The *Polemis* rule has a sound historical background, and, as has been shown above, there seem to be no decisions or dicta which substantially conflict with it.

(b) The foreseeability test will not explain the "egg-shell" skull cases concerning the tort of negligence itself. The authority of these cases is well established and no one disputes that a person who negligently (one must necessarily beg the question and postulate that the tort of negligence has been committed) causes injury to another must take his victim as he finds him.[55]

Difficulties are at once encountered in reconciling this principle with liability only for foreseeable consequences, and Professor Goodhart attempts to explain the difficulty away in the following way: "Foresight is a concept which differs totally from probability. I may have foresight that a thing may happen even though it is

[51] (1874) L.R. 9 Q.B. 263 at p. 268, *per* Quain J.
[52] [1914] P. 72 at p. 76, *per* Sir Samuel Evans.
[53] [1920] A.C. 956 at p. 964.
[54] [1921] 3 K.B. 560 at p. 571.
[55] See *Clippens Oil Co.* v. *Edinburgh Trustees* [1907] A.C. at p. 303, *per* Lord Collins; *Grant* v. *Australian Knitting Mills* [1936] A.C. at p. 92, *per* Lord Wright; *Bourhill* v. *Young* [1943] A.C. at p. 109, *per* Lord Wright.

exceedingly improbable. Thus, a man who throws a book out of a window has foresight that the book may strike someone, although in the ordinary connotation of the word, there is no probability of it, as the chances may be a thousand to one against." [56] With all deference to the learned writer, it may be asked at what odds against the possibility does the consequence become not foreseeable? Since rules are often best tested by extreme examples, it may be profitable to apply this proposition in a concrete case. If the driver of a car knocks down a shabbily-dressed pedestrian carrying a parcel in such circumstances that he could have foreseen damage resulting to the pedestrian and his property as the result of his act, there is no doubt that he would be found negligent. If the driver is to be held liable for the loss of the pedestrian's income and the damage to his parcel, what are the odds against this shabbily-dressed person having the highest income in the world, or of his parcel containing an invention of fabulous value? Yet there is no doubt on accepted principle that the driver would be liable for such loss, as would the person in the example of Scrutton L.J.,[57] who negligently injured the favourite for the Derby. Can such damage really be called "foreseeable"? There must always be a possibility, however slight, of any consequence following directly from an act if it does in fact occur; the courts would indeed have a difficult task in deciding which consequences were too improbable for foresight. Surely the only solution to this problem lies in a recognition of the fact that the "egg-shell" principle imposes liability for consequences which could not have been foreseen.

(c) If the "foreseeability" test of remoteness can only be applied with difficulty to the tort of negligence, it is well nigh impossible to apply it to torts of "absolute" or "strict" liability. It is interesting to note that textbooks dealing with this problem draw their illustrations, almost without exception, from cases on negligence. Similarly, in reported decisions on remoteness cases the courts seem to have relied almost exclusively on such examples. Yet nearly all textbooks agree that the rule as to remoteness, whatever it may be, is applicable to all torts, and, moreover, they deal with it under the heading of general principles of liability in tort.[58] It is inconceivable that the rule as to remoteness varies from tort to tort, and we may assume the true test must be capable of covering them all. But the foreseeability test would hardly cover the liability of the auctioneer in *Hollins* v.

[56] *Essays in Jurisprudence and the Common Law*, p. 126.
[57] *The Arpad* [1934] at pp. 201–2.
[58] *Halsbury*, Vol. X, p. 102, note (*p*); *Winfield*, 5th ed., p. 67; *Salmond*, p. 133; *Clerk and Lindsell*, 10th ed., p. 185.

Fowler,[59] the press reporter in *Hulton* v. *Jones*,[60] or the owner of the reservoir in *Rylands* v. *Fletcher*,[61] to quote only a few examples. As a person can be sued for libel, conversion, trespass, the acts of dangerous animals, or under the *Rylands* v. *Fletcher* principle, without being in the slightest degree negligent, it would be ludicrous to hold him liable only for those consequences of his tort which he could have foreseen. What damage to Artemus Jones, as a barrister, could the reporter have foreseen if he was unaware of his existence? In such cases as these the damages must surely be estimated on the footing of the actual loss to the injured party, guided by the limiting principle of directness of causation.

(d) The final argument in favour of the directness test is to be found in the general principle underlying liability in tort. Contractual liability, on the one hand, is self-imposed, and no party is going to agree impliedly to bear liability for damage which he cannot foresee. Liability in tort, however, is not self-imposed but imposed on the parties by established rules of law. In the words of Lord Sumner, "The object of a civil inquiry into cause and consequence is to give reparation for damage done."[62] Foresight may be very relevant in deciding whether the defendant has committed a tort, but if he has, and the damage to the injured party is the direct consequence of the tortious act,[63] why should the tortfeasor escape liability at the expense of the innocent plaintiff? While liability for direct consequences is limited by the rules of causation, and while the plaintiff has to prove that a tort has been committed not only towards him but also towards the specific interest for which he is claiming damage,[64] less injustice will be done by the application of the directness test than if the tortfeasor is to escape liability for consequences which are not foreseeable. In individual cases there will clearly be some difficulty in deciding whether a consequence is direct, or the offshoot of a *novus actus interveniens*. But the courts would have no less severe a problem in determining whether a consequence was "foreseeable" and the matter can, no doubt, be left to their common sense.

The present submission is that, although the decisions resulting from the application of the two divergent tests may usually be the same, it is grossly mistaken in principle to apply a test of remoteness to tort which is only suitable to questions of remoteness in

[59] (1875) L.R. 7 H.L. 757.
[60] [1910] A.C. 20.
[61] (1868) L.R. 3 H.L. 330.
[62] *Weld-Blundell* v. *Stephens* [1920] A.C. at p. 926.
[63] *e.g.*, if the ship is burnt as the result of the careless dropping of the plank in *Re Polemis*.
[64] So in *Bourhill* v. *Young* [1943] A.C. at p. 109, Lord Wright states that the *Polemis* principle must "be understood to be limited, however, to direct consequences to the particular interest of the plaintiff which is affected."

contract. It is interesting in this respect to note the further remarks of two judges in the very cases in which they assert the similarity of the two tests. Thus, *per* Bowen L.J. in *The Argentino*: "The question is not what would have been the damage that might have been anticipated in the case of other ordinary ships, but what was the direct and actual damage done in the case of the *Argentino*. We have not to consider . . . whether sea-going ships ordinarily have such engagement as the *Argentino* had at the time of the collision, but what was the direct and natural consequence of a collision to a ship which, in fact, enjoyed such prospects of employment."[65] Again, *per* Greer L.J. in *The Arpad*: "It has been frequently decided that if a shipowner is deprived for a short time of the use of his vessel, which he uses in his business for the purpose of earning profits, the court can take into account the actual engagements of his ship during the time he is so deprived of the use of it."[66] There can be little doubt that such loss flowing from a breach of contract would be irrecoverable in the absence of express knowledge on the part of the defendant.

The true test would seem to be that the defendant's liability in contract is limited to the damage he could foresee resulting from its breach, while in tort he is liable for the actual damage caused to the specific interest of the plaintiff towards which the tort has been committed. Any attempt to reconcile these tests, therefore, is doomed to failure, since their fundamental objects differ so widely. In contract the courts are merely implementing an obligation created by the parties themselves, while in tort they are applying objective rules of law with the purpose of providing reparation for damage done. It is to be hoped that when the House of Lords at length speaks on the subject, this fundamental distinction will at last be recognised and the question decided beyond dispute.

J. F. Wilson.[67]
C. J. Slade.[67]

[65] (1888) 13 P. at p. 203.
[66] [1934] P. at p. 217. The views expressed by Bowen and Greer L.JJ. are applied to recover loss for actual charterparties, etc., in *The Northumbria* (1869) L.R. 3 A. & E. 6, *The Kate* [1899] P. 165 and *The Racine* [1906] P. 273.
[67] Mr. Wilson is a lecturer in Law at the University College of Wales, Aberystwyth, and Mr. Slade is a practising barrister.

THE JUVENILE LAW-BREAKER IN THE U.S.S.R.

THE treatment of the young offender in the U.S.S.R is marked by two main trends at the present day: a return to greater personal responsibility and family discipline, and an emphasis on harnessing all its nationals to the productive machine. The whirligig of time has had its revenges, and the zealous revolutionary experiments of the twenties and early thirties have given way to the teaching of experience. The fact that huge masses of children were vagrant and uncontrolled as a result of war and famine represented the problem of the delinquent as one of circumstances, rather than character. As times have become more normal the bitter realities of the situation have reasserted themselves. As late as 1932 it was possible for Professor V. S. Utyevski to point out that the bourgeois world still clung to the necessity for punishing young criminals, whereas Russia, since 1918, had substituted purely educative sanctions.[1] The trial of juveniles by courts was branded as reactionary, though the juvenile courts of many western countries were grudgingly admitted to be better than the "ordinary courts." In his conclusions the writer stated that "Juvenile crime is a concomitant of capitalism. In a socialist society there will be no place for juvenile crime."[2] When it is added that young people today are commonly tried in the "ordinary courts" for many crimes, from the age of 12, in the U.S.S.R., it will be appreciated that a change, much like that which characterises the Soviet law of marriage,[3] has taken place, and that juvenile crime is still a problem facing the socialist society of today. The "hard core" of incorrigibles which tries the patience of every society exists in Russia. For them only the severest measures provide a palliative. In applying these measures the Soviet jurist is troubled by qualms. If they are imprisoned, is this a relapse to the imprisonment of children of which he accuses the capitalist world? The solution appears to be that typical of Soviet thought: a prison ceases to be a prison if it is called an educative establishment. Certainly, the motives of the State power may no longer be punitive, but how far is this material to the concrete service of sentence? The needs of reconstruction also call for manpower. There seems little doubt that the young offender is here being put to good use. Healthy

[1] *Juvenile Delinquents*, in the series *Child Welfare*, Moscow (1932), p. 8.
[2] *Ibid*, p. 20.
[3] See Dr. R. Schlesinger's book: *Changing Attitudes in Soviet Russia—the Family*.

productive labour, if it be such, does seem preferable to the alternatives often adopted. How this system works in practice is difficult to decide. Testimony on either side is likely to be highly coloured. Neither the political party nor the vicious criminal is likely to be a good first-hand source of information.

A little historical retrospect is necessary in order to appreciate the measure of the change in the attitude of the Soviet State towards its troublesome young. Here Professor Utyevski's work is very detailed [4] and may be checked and supplemented by a work of Professor M. M. Isayev.[5]

A decree of January 14, 1918, set up special Juvenile Commissions to deal with children under 16. Their avowed object was to protect the child and re-educate him, in order to turn him into a good citizen, ready to play his part in the work of the community. The composition of these commissions was interesting and may be noted, though already well known outside the U.S.S.R. The head of the commission was a representative of the local education authority, there was a medical officer, a juvenile investigator, a trade union official, a children's "friend," and, last but not least, the people's judge of the district. The cases were tried in camera and no reports appeared in the Press. The solutions were those dictated by medical, psychiatrical and educational theory, rather than the rules of law. Children under 14 were never punished. Those between 14 and 16 could be sent to corrective homes, or could be remitted for trial to the ordinary courts if the sanctions available to the commission were inadequate to deal with them. Children could be admonished, returned to parents, boarded out and dealt with in the usual ways common to this type of jurisdiction. Children over 16 fell under the jurisdiction of the ordinary courts but were sent to special places of confinement, away from adult offenders. These workhouses fell under the Ministry of Justice, not Education, and this led to some doubts as to whether they were not, in fact, prisons.[6] Professor Isayev draws a distinction between children of 14 to 16 who acted "with knowledge." An act done deliberately and counting the consequences exposed such minors to trial in the courts.[7]

During the twenties the details of the system changed and the age-limits varied. Educational reformatories tried to cure the offender by political indoctrination and teaching useful trades. In 1922 moral inculcation and wider intellectual horizons were the ideals advocated. Provision was made for special treatment of juveniles in the Code of Corrective Labour of 1924. A significant feature was the experiment conducted by the O.G.P.U. in training the most intractable offenders for productive work in mines and

[4] *Juvenile Delinquents* (*supra*).
[5] *Criminal Law: General Part*, Moscow (1948), pp. 326–333.
[6] *Juvenile Delinquents* (*supra*), p. 11.
[7] *Guiding Principles of Criminal Law*, 1919, cited Isayev (*supra*).

factories.[8] Instead of learning small handicrafts these men were taught for heavy industry. They lived in "prisons without bars" under what is said to have an autonomous system, complete with "trusties" and kangaroo courts. When sufficiently trained they were "leased" to nearby factories, with which their communes were affiliated. When they had completed training and otherwise satisfied the rules they were released and took their place at the benches with their fellows. In 1931 4,000 youths were farmed out and 400 were released. These figures are not astronomical but the pattern is interesting. In 1926 the Criminal Code provided that minors between 14 and 16 might receive only half the usual sentence.[9] In 1929 it was ruled that cases involving children between 14 and 16 should no longer be tried by the courts in any circumstances.[10] But a change-about was imminent.

On April 7, 1935, full criminal liability was reintroduced for children over the age of 12 years for robbery, theft, homicide, attempted homicide, wounding and aggravated assaults.[11] This was supplemented by further provisions in 1940.[12] An authentic interpretation of this legislation followed.[13] This explained that liability was the same for negligent as intentional crimes. A "ruling directive" mitigated the severity of the law to some extent by providing that this legislation should not be extended by analogy.[14] For all offences not specified in the above list the age of criminal liability was fixed at 14 years.[15] A problem has evidently arisen where a child is retarded in mental development. Professor Isayev[16] states that such children may be treated as incapable on mental grounds, but the text of the law on this subject seems concerned only with insanity in a very strong form.[17]

On May 31, 1935, the much vaunted functional Juvenile Commissions were abolished. The medico-educational system of correction thereby suffered a blow. It may be only fair to suggest that juvenile crime in 1935 was different from that of the immediate post-revolutionary times, that it is less common and is the work of more hardened wrongdoers. At any rate there has been a strong reaction towards despised bourgeois practices. Youths must, it is now said, be deterred from crime, and must acquire a personal sense of responsibility. Some mitigation of trial by the "ordinary

[8] *Juvenile Delinquents* (*supra*), p. 17, Pogryebinsky (1929), "A Factory of Man" there cited.
[9] R.S.F.S.R. Criminal Code, Article 50
[10] Ruling of the Central Executive Committee and Council of People's Commissars of R.S.F.S.R., October 30, 1929.
[11] Decree of same.
[12] Decree of Supreme Soviet of U.S.S.R., December 10, 1940
[13] Ruling of the Presidium of the Supreme Soviet, July 7, 1941.
[14] Directive of Supreme Court of the U.S.S.R., July 21, 1935. This refers to the extension of sanctions to offences not referred to in any statute but involving similar considerations.
[15] Decree of Presidium of the Supreme Soviet of the U.S.S.R., May 31, 1941.
[16] *Criminal Law: General Part* (*supra*).
[17] Criminal Code of the R.S.F.S.R., Article 11

courts" is provided in large centres of population where the incidence of juvenile crime is large enough to justify specialisation. A decree now provides that special divisions of the people's courts try juvenile offenders, and that specially trained people's judges preside.[18]

Juvenile Procedure is outlined in an Appendix to the Code of Criminal Procedure of the R.S.F.S.R. Within a week of the commission of a crime the juvenile ought to be summoned, with his parent or guardian, and a representative of the school, to a preliminary hearing. The consent of the procurator is required before a case is set down for trial (which must be within 10 days).[19] The two lay assessors, who sit with a people's judge in all cases, must be drawn from school teachers on the panel of assessors. Children's cases must always be tried on a different day from adults. A representative of the office of procurator must attend the trial and be vigilant to detect irregularities. No child may be tried without a defence advocate. The child must be told of this right and the judge must insist on such an advocate being retained, and must assist him in preparing his case. Appeals by children from conviction are tried with special despatch. If the procurator is dissatisfied with a decision he may "protest" it, even if no notice of appeal is given by the child.[20] Appellate courts must form special divisions for the trial of juvenile appeals.[21] In any case the judge must invariably submit his decision to the appellate court for scrutiny and confirmation. Any adult contributing to the delinquency must be named in the judgment, and any inadequacies in the work of the school must be pointed out. It is emphasised that a correct atmosphere must be maintained in court and the special nature of this jurisdiction remembered.

Juveniles of at least 16 years of age are liable to the full rigours of the law for embezzlement and other crimes showing calculation, for violent and vicious crimes, and other very serious offences. After conviction they may be imprisoned but must be detained in separate juvenile prisons. They may not be kept more than a month in reception or transfer centres. First offenders must not come in contact with "young lags."[22] Minors between 14 and 16 are liable in bad cases to sentences of forced labour. In other cases they, like children under 14, receive less severe punishment. This often takes the form of being sent to a special institution managed by the Ministries of Education and Health. A child may

[18] Decree of People's Commissariat of Justice of the U.S.S.R., June 19, 1948.
[19] Directive of the Supreme Court of the U.S.S.R., July 21, 1935.
[20] This is done by reporting to higher procuratorial channels, who bring the matter before a higher court. The institution of procurator or State's attorney is familiar in most European systems but has no precise equivalent in this country.
[21] Directive of the Supreme Court of the U.S.S.R., July 21, 1935.
[22] This refers to habitual criminals, "recidivists" or relapse cases, in Continental usage.

also be sent to an institution where, to use our phrase, it is "in need of care or protection." [23] Censure, submission to parental control, are among other measures. If a child is a persistent offender or escapes from a children's institution it may be given a long term of imprisonment.

The old O.G.P.U. system exists in a different form. Where a court dismisses a charge of petty crime against a child under 16 it may send the child to a correctional colony.[24] It will be noted that the O.G.P.U. communes were designed to deal with the worst incorrigibles. Labour is now regarded as preferable to confinement, it seems, and reserved for the least criminal types. Children may be released at any age up to 16 but will not be released under the age of 14 unless they have parents, guardians or relatives ready to take charge of them. These new colonies are operated by the M.V.D., successor in title of the N.K.V.D. and the O.G.P.U. They also take in children between the ages of 11 and 16 who are found homeless or vagrant, and children who have proved unmanageable in children's institutions.[25]

Parents are personally liable for encouraging their children to commit crime, and may be punished with *at least* five years' imprisonment.[26] In every juvenile trial the court watches for evidence of instigation, and orders a prosecution of the parents.[27] The police ("militia") are authorised to impose fines on parents, in the sum of up to 200 roubles, for hooliganism and street pranks of their children.[28] It is the duty of the court at the trial to ascertain whether this has been done. If parents are in any way to blame for a child's delinquency they may be made to pay, or contribute towards, the cost of its maintenance in a children's institution.

Although the law of juvenile tortfeasors in the U.S.S.R. is less specifically Russian than the law of juvenile crime, it is now a conscious part of the same campaign against juvenile disorder and ought not to be omitted. The system is obviously based on the French Civil Code, but the Soviets now insist that their rules are essentially quite different from the rules of Western Europe, though the texts hardly bear out this claim. A brief reference to French and German law may be useful. The French Civil Code [29] makes parents vicariously liable for civil damage caused by children for whom they are generally responsible. In 1922 and 1937 amending

[23] Decree of Council of People's Commissars of the U.S.S.R., May 31, 1935, Articles 11, 22.
[24] Orders of the People's Commissariat of Justice of the U.S.S.R., June 19, 1943; June 15, 1943.
[25] There are no specific provisions altering the mode of employment of these minors. Presumably they are still used in industry.
[26] Law of April 7, 1935.
[27] Juvenile Procedure Supplement to R.S.F.S.R. Criminal Procedure Code (1947) Part 2 (6).
[28] Decree of May 31, 1935, Article 18.
[29] Article 1384, text in Lawson, *Negligence in the Civil Law*, 186.

legislation was passed [30] which makes either parent (father or widowed mother) liable for minor children living at home, but allows proof that the parent could not prevent the act which caused the damage. This interesting point of causation is very relevant to the discussions among the Soviet jurists. The German Civil Code [31] provides that where any person is bound by law to supervise a minor he is also bound to make compensation for any damage which such minor unlawfully inflicts on a third party.

A child under 14 is not civilly responsible in the U.S.S.R. If a child is over 14 but under 18 he is equally liable with his parents.[32]

If a child is under 14 his parents are liable for his torts unless formally relieved of the duty of supervision. The influence of the French Civil Code is clear. An amendment to the Soviet Civil Code makes the parents equally liable for the torts of children between 14 and 18.[33] Paradoxically, this amendment makes no reference to any duty of supervision. The courts interpret this enactment literally and have placed full liability on parents, even though the child is no longer under their care.[34] Since children of such ages may earn a little money it would seem that the liability of the parents ought to be reduced, not increased. Parents and child are usually joined as defendants. If the plaintiff elects to sue the parents alone the court must join the child as primary defendant. If the child is sued alone it is the practice for the court to join the parents, on its own initiative. This is laid down in a "ruling directive," [35] and can now only be altered by legislation, but is criticised as inconsistent with the nature of the parents' liability.[36] Judgment is usually given against parents and children jointly for the full amount, in case neither can pay in full. It has been suggested that the liability of the parents ought to be secondary, that of sureties only.[37] In most cases the child will have no assets or earnings, so the question seems academic. There is some ground for the view that if a child obtains paid work while an instalment order is still undischarged, this might be made primarily liable to satisfy it. If several children join in the commission of a tort, the various groups of parents are said to be proportionately liable. This is probably an academic solution and may not represent the practice of the courts. Both father and mother are normally equally liable for the torts of their child. The earnings of each are liable to be garnisheed. If the courts have awarded sole custody of a child to

[30] Loi de novembre 7, 1922; loi d'avril 5, 1937, Lawson, *supra*.
[31] Article 832, Lawson, *supra*, 206.
[32] Articles 9, 405, as amended in 1935.
[33] *Ibid.*
[34] Professor Tadyevosyan, *Soviet State and Law* (1949) No. 4. Discussion on Torts of Children.
[35] Directive of Full Bench of the Supreme Court of the U.S.S.R., June 10, 1943.
[36] Tadyevosyan (*supra*).
[37] On the ground that there is no actual joint tort.

one parent, the other parent will not be liable for future torts of the child, so far as they are based on the duty of supervision. If one of two parents is liable, the earnings of that parent and his or her share of the joint estate are liable to be taken in satisfaction of the judgment.

There is considerable theoretical divergence as to the nature of the parents' liability for children under 14. One view is that there is only a presumption of actual liability, based on failure to exercise adequate supervision, even if the child is living at home, and that the parent can rebut this presumption by proving he could not prevent the commission of the tort.[38]

Others say that any tort committed by a child living at home is vicariously attributed to the parents. They must, at their peril, so train and discipline their child that he observes the law. It is immaterial, in this view, that the parents could not have prevented the commission of the particular tort in question.[39] This latter view is based on the aim of the law: the prevention of parental neglect and juvenile vagrancy. The practical consequences of this debate appear to be small. Those lawyers who insist that liability depends on fault are usually satisfied with constructive fault, *e.g.*, allowing the children to keep bad company.[40]

The law, again, does not make it clear what, if at all, is the effect of de facto absence of supervision. If a child lives in a different town from his parents, but is not in a public institution or in charge of a local authority, the parents seem to remain liable for his torts, and unable to "delegate" the duty of supervision so as to escape responsibility. Illness, absence at work, are no excuse for the parent. This is all quite a different world from the free-and-easy ideas of the revolutionists.

Where the child is over 14 the silence of the legislation on the matter of supervision eliminates the problem, but leaves a curious anomaly. No doubt this question will be taken into account when the long-awaited new Civil Code is drafted. In the meantime there are signs that on this subject political thought in the U.S.S.R. has turned about in the direction of family discipline and these particular rules about children's torts, the heritage of the New Economic Policy, and of obviously bourgeois origin, may fit quite well into the present Soviet system, and that revolutionary codes, on this subject at least, have waited too long and would now come too late.

ALBERT KIRALFY.[41]

[38] Bratus, *Civil Law Textbook* (1947), 367; A. V. Karass, *Soviet State and Law* (1949), No. 5, pp. 70–71.

[39] K. Yaichkov, G. M. Sverdlov, V. I. Syerebrovsky, *Soviet State and Law* (1949), *ibid.*

[40] "Culpa in eligendo," an element in vicarious liability on the Continent. The practical consequences may be much the same as under the system of strict liability.

[41] Reader in Law, King's College, London.

A NOTE ON THE REVIVIFICATION OF A DISSOLVED FOREIGN CORPORATION

APART from the Companies Act, the dissolution of a corporation by the law of the country of incorporation, without any provision being made for the payment of creditors, is unreservedly accepted by the English courts [1] and this even where there are assets [1] or a branch office [2] (or agency) in this country. Some results of this recognition must be briefly enumerated: the corporation can neither sue,[3] nor be sued [4]; it is possible that debts due to and from it are abrogated by the dissolution [5]; and in any event all its property in England will vest in the Crown as *bona vacantia*.[6] But in many cases these consequences will prove more theoretical than actual, for a situation of this kind is usually produced by a revolutionary disturbance, and in such circumstances the branch in England will often remain in ignorance of the true state of affairs for some time after the dissolution. Thus, as the cases show, considerable uncertainty existed after the 1917 Russian revolution, and the London branch of the Russian and English Bank continued its operations until June, 1920, whereas the corporation had ceased to exist at the latest by January 26, 1918. Moreover, even if the dissolution is notorious, it may be, so far as English law is concerned, a mere nullity as being the act of a non-recognised body; subsequent recognition of that body as a *de facto* government operates as a retroactive validation [7] of the dissolution (if it was in fact the act of the new government or has been adopted by them), with disastrous consequences on acts performed by the corporation in the interim. The position of an English branch which continues to function in these conditions is aptly put by Atkin L.J. [8]:

[1] *Lazard Bros.* v. *Midland Bank* [1933] A.C. 289, esp. *per* Lord Wright at p. 297.

[2] *e.g.*, *Russian and English Bank* v *Baring Bros.* [1932] 1 Ch. 435. (Compliance with the provisions as to oversea companies contained in the Companies Act makes no difference. If the branch is incorporated under the English Companies Act, obviously the dissolution will in no way affect it.)

[3] S.C.

[4] *Deutsche Banque* v. *Banque des Marchands de Moscou* (1932) 168 L.T. 864.

[5] Lord Atkin—*Russian and English Bank* v. *Baring Bros.* [1936] A.C. 405, at p. 427; but *cf.* Lawrence L.J. in *Re Wells* [1933] Ch. 29, at p. 51–2.

[6] *Cf. Re Higginson and Dean* [1899] 1 Q.B. 325; *Re Wells* (*supra*); *Lazard Bros.* v. *Banque Industrielle de Moscou* [1932] 1 K.B. 617, *per* Scrutton L.J. at p. 641; *Russian and English Bank* v. *Baring Bros.* [1936] A.C. 405, *per* Lord Maugham at p. 444. Chalmers and Hood Phillips, *Constitutional Law* (6th ed.), p. 168; *Palmer's Company Precedents* (16th ed.), pt. 2, p. 660

[7] *Luther* v. *Sagor* [1921] 3 K.B. 532; *White, Child, and Beney, Ltd.* v. *Eagle Star and British Dominions Insurance Co., Ltd.* (1922) 38 T.L.R. 616; Oppenheim, *International Law* (6th ed.), Vol. I, p. 144.

[8] *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse* [1923] 2 K.B 630 at p. 668.

> "The result of holding that it was, in fact, dissolved in January, 1918, is to make it impossible to enforce any of its rights or liabilities, and to leave in considerable peril all those who in the course of banking business in the City of London have in any way, at any time after 1917, taken any part in disposing of or handling its assets; for obviously a non-existent person can give no title to anything."

Many of the difficulties resulting from the dissolution may be avoided by obtaining a winding-up order under section 399 (5) (*a*) or section 400 of the Companies Act, 1948 [9]; it seems jurisdiction may be founded on the mere presence of assets in this country.[10] From this rather illogical power to wind up a dissolved corporation four interesting points emerge:

(i) Despite the possibility of the abrogation of his debt, a creditor may petition *qua creditor* for a winding-up order.[11]

(ii) As a non-existent entity cannot be wound up, and as the provisions of the Companies Act have no meaning on any other basis, the corporation must be wound up as if it were a corporation which had not been dissolved.[12]

(iii) The property of the corporation which on dissolution, theoretically at least, vested in the Crown, must be deemed to have revested in the corporation,[13] it being a distinctive feature of an English winding-up that the property is vested in the company and not in the liquidator.[14]

(iv) The cases clearly show that pre-dissolution assets may be wound up, pre-dissolution debtors sued, and pre-dissolution creditors paid.[15]

From these propositions it is obvious that once a winding-up order is made the dissolution becomes to a certain extent irrelevant, and that the corporation is correspondingly revivified. It is the extent of this revivification which is of importance. Does it in any way affect the invalidity of acts performed in the period between the winding up and the dissolution?

On grounds of convenience alone it would be desirable if some mitigation could be found for the severity of the common law. For those who acquire property from the corporation during the interim period acquire no title thereto, and if the winding-up has no effect on this, then it is presumably incumbent [16] on the unfortunate

[9] 11 & 12 Geo. 6, c. 38. Formerly ss. 338 (1) (*d*) (i) and 338 (2) of the Act of 1929.

[10] *Banque des Marchands de Moscou* v. *Kindersley* [1951] Ch. 112; see 11 (1952) Camb. L.J. 198.

[11] This was a matter of assumption in *Re Russian and English Bank* [1932] 1 Ch. 663; *Re Russian Bank for Foreign Trade* [1933] Ch. 745; but was expressly mentioned by Lord Atkin, *Russian and English Bank* v. *Baring Bros.* [1936] A.C. 405 at p. 429.

[12] *Russian and English Bank* v. *Baring Bros.* [1936] A.C. 405.

[13] S.C. *per* Lord Atkin at p. 426–7.

[14] *Cf. e.g.*, *Re Webb & Co* [1922] 2 Ch. 369, at p. 388.

[15] See the cases mentioned in n. 11, *supra*.

[16] By virtue of s. 248 (1) of the Companies Act, 1948.

liquidator to recover such property, which, in the case of, *e.g.*, a bank, would be a virtually impossible task. Moreover, the agents of the corporation would find themselves liable to an action for breach of warranty of authority [17] at the suit of those who find themselves prejudiced by the liquidator's activities. But recently Vaisey J. rejected the argument that the revivification validates acts performed during what he termed the "*interregnum*"; and in *Re Banque des Marchands de Moscou, Wilenkin* v. *The Liquidator*,[18] he dismissed the claim of a legal expert, who had rendered admittedly valuable services to the bank in this country between the date of the dissolution and the making of the winding-up order, to participate in the liquidation. An examination of the authorities (which he did not mention nominatively) failed to convince the learned judge that there was (in the eyes of the law !) anyone to whom the services could have been rendered. He then said [19]:

> "The only ground on which this claim could be allowed would be that I must decide as a matter of law that the bank was, for the purpose of Mr. Wilenkin's activity, in existence, and was employing him in and about its business and actions. These metaphysical conceptions seem to me to be extremely difficult, and when there is a hypothesis on a hypothesis such as one has when it is said that the non-existent bank was none the less deemed to be employing a non-appointed agent to conduct its non-existent affairs, one gets into a maze of metaphysics . . . from which there is really, I think, no logical escape."

However, it is suggested with the greatest respect that there is some authority in the cases [20] to justify taking the other and more realistic course, *i.e.*, that once the winding-up order has been made the company ceases to be, or have been, non-existent. In *Russian and English Bank* v. *Baring Bros.*[21] three members of the House of Lords held that, as a matter of necessary implication, the dissolved corporation must be wound up "as if it were a company which had not been dissolved" [22]; the question was asked,[23] but, unfortunately, not expressly answered, as to the extent of this revivification. It is suggested that within the English jurisdiction it is complete. Bearing in mind the normal rule that a company's liabilities are ascertained as they exist at the time of the

[17] *Cf. Yonge* v. *Toynbee* [1910] 1 K B. 215, esp. at pp 227, 232.
[18] [1952] 1 T.L.R. 739; [1952] W.N. 151; [1952] 1 All E R. 1269.
[19] [1952] 1 T.L.R., at pp. 747–8.
[20] Non-judicial authority is barren on this point. See generally: *Palmer's Company Law* (19th ed.), pp 449–50; Professor B. A. Wortley, 14 B.Y.B I.L. 1, and 48 L.Q.R. 321; Dicey, *Conflict of Laws* (6th ed.), p. 476; Lloyd, *Unincorporated Associations* (1938), pp. 196–7; Cheshire, *Private International Law* (3rd ed), pp. 632–6; Wolff, *Private International Law* (2nd ed.), p. 305; *Buckley on the Companies Acts* (12th ed), annotations to ss. 399 (5) (a) and 400; Halsbury, *Laws of England* (1949 ed), vol. 5, pp 942–8.
[21] [1936] A.C. 405.
[22] *Per* Lord Blanesburgh, at p. 421.
[23] By Lord Russell, at p. 438.

winding-up order,[24] what are the liabilities of a corporation wound up under section 899 (5) (*a*) or section 400? Apart from the dissolution which should be treated as irrelevant on the making of the order, no distinction can be drawn between pre- and and post-dissolution transactions: this was clearly the view of Lord Atkin[25]:

> "Nor is it any easier to confine the distribution to assets existing at the date of the dissolution among creditors in existence at the same date. The latter proposal, indeed, seems to accentuate difficulties in the case of a bank trading after dissolution and daily changing its assets and liabilities."

Earlier in his judgment he referred to "creditors of the . . . post-dissolution period."[26] It should also be noted, as Evershed M.R. remarked in *Banque des Marchands de Moscou* v. *Kindersley*,[27] that the construction placed on what is now section 400 of the Companies Act, 1948, by Bennett J.,[28] *i.e.*, that it had no application to a corporation dissolved before the commencement of the Act, "involves the notion that a foreign corporation which has been 'dissolved or otherwise ceased to exist as a company' may still be regarded as carrying on business in this country." That there is no inherent impossibility in such concepts is shown by *Tymans, Ltd.* v. *Craven*,[29] where the Court of Appeal held that the reinstatement under section 353 (6) of the Companies Act of a company which had been dissolved on removal from the register under section 353 (5), operated as a complete validation of all acts purported to have been done on behalf of the company during the time when it was non-existent. Though this was a decision on a more explicitly drafted section of the Act,[30] the present submission is that there is no obstacle to a similar effect being attributed to section 899 (5) (*a*) and section 400—they clearly presuppose a revivification, but give no indication of its extent. Surely this limitation should be dictated by what is reasonably necessary for allowing effect to be given to that which is the obvious import of the section—*i.e.*, the satisfactory winding-up of a dissolved company—to hold that the revivification is only partial would serve merely to increase the difficulties of liquidation, often to an almost insuperable extent.

[24] *Re General Rolling Stock Co* (1872) 20 W.R 762.

[25] [1936] A.C., at p. 429. Lord Blanesburgh at p. 422 expressed his approval of the grounds on which Lord Atkin based his decision. Paradoxically both of their Lordships mentioned that the revivification was for "particular and limited purposes" (at pp. 417 and 428).' If the passage quoted has any validity the "limited purposes" must be very wide.

[26] At p. 428.

[27] [1951] Ch. 112, at p. 129.

[28] *Re Russian and English Bank* [1932] 1 Ch. 663 (s. 333 (2) of the Companies Act, 1929).

[29] [1952] 2 Q.B. 100 (*cf Morris* v. *Harris* [1927] A.C 252).

[30] Lord Atkin [1936] A.C., at p. 429, expressed the wish that the legislature had worked out the difficulties consequent on the application of ss. 899 (5) (*a*) and 400.

Were Lord Atkin's view to be adopted there does not seem any cause for differentiating between acts performed by the London agency before and after notice or constructive notice of the dissolution—in view of the possible consequences the wisest course for all concerned would be to apply for a winding-up order as soon as the dissolution is known of or becomes valid. If the agents attempted to take advantage of the situation to engage in self-aggrandisement, there seems to be no reason, once a winding-up order is obtained, why they should not be liable to the sanctions imposed by sections 332 and 333; for section 399 (1) enacts that "all the provisions of this Act with respect to winding-up shall apply," and the two former sections fall within the general heading of "Provisions Applicable to Every Mode of Winding-Up."

The only authority which appears at first sight to be in opposition to a complete revivification is *Re Russo-Asiatic Bank*,[31] where Eve J. held that the Limitation Acts did not run in favour of a dissolved corporation between the date of the dissolution and the date of the winding-up order: the ground of the decision being that during that period, as there was no one who could have been joined as a defendant, there was no cause of action. But this represents no more than a very necessary bridge between the common law and the Companies Act, for to hold to the contrary, total revivification on winding-up or not, would completely negative the purpose of the winding-up in cases like *Re Tovarishestvo, etc., Rabenek*,[32] where the petition was presented 24 years after the dissolution in Russia.

Juristically, no doubt, the proposed solution is inelegant, but no more so than the revival produced by section 353 (6), indeed, logic was, fortunately, abandoned when it was enacted that a dissolved company could be wound up, and as Lord Macmillan said[33]:

> "I do not think that it is either necessary or profitable to discuss problems as to the precise legal status of a dissolved company which has been ordered to be wound up. In this connection metaphors may easily be misleading and serve only to create their own puzzles."

In refusing to validate acts performed by or on behalf of the corporation before the date of the winding-up order, Vaisey J. refused to entertain any "metaphysical conceptions," but it is suggested with all due deference that his judgment is based on a strict theory of corporate personality which is out of place when dealing with a problem of this nature.

M. MANN.[34]

[31] [1934] Ch 720; *cf.* Preston and Newson, *Limitation of Actions* (2nd ed.), p. 8–4. It is suggested that *Russian and English Bank* v. *Baring Bros.* [1934] 1 Ch. 277, where the *ratio decidendi* adopted by Bennett J. was that there was nothing in s. 399 (5) (a) in any way to reanimate the plaintiff bank, should be reconsidered in view of the later House of Lords decision.

[32] [1944] Ch. 404. [33] [1936] A.C., at p. 439.

[34] Mr. Michael Mann, LL.B.(Lond.), holds a Tutorial Studentship at King's College, London, where he is engaged in research for a higher degree.

NOTES OF CASES

Evidence of "Similar Acts"

Two recent decisions, *R.* v. *Hall* [1952] 1 All E.R. 66, a decision of the Court of Criminal Appeal, and *Harris* v. *D. P. P.* [1952] 1 All E.R. 1044, a decision of the House of Lords, make it opportune to review what is perhaps the most difficult task which can face a presiding judge at a criminal trial, namely, the admission or rejection of evidence of "similar acts" by an accused person.

Two general principles have for long been unquestioned. (1) It is not competent for the prosecution to adduce evidence of "similar acts" by the accused merely to lead to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. (2) The mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, *e.g.*, whether the acts alleged to constitute the crime were designed or accidental, or to rebut a defence which would otherwise be open to the accused (*Makin* v. *Att.-Gen. for New South Wales* [1894] A.C. 65).

The difficulty of applying these principles with confidence was illustrated and increased by the decision of the Court of Criminal Appeal in *R.* v. *Sims* [1946] K.B. 531.

In *R.* v. *Sims* Lord Goddard, delivering the judgment of a court of five judges, laid it down (a) that evidence is admissible if legally relevant to the issue whether the accused has committed the act charged; (b) that evidence is not to be excluded merely because it tends to show the accused to be of bad disposition, but only if it shows nothing more, and (c) that evidence of specific acts or circumstances connecting the accused with specific features of the crime charged is admissible even though it tends to show him to be of bad disposition. The court rejected the often expressed view that the admissibility of evidence of "similar acts" depends on the nature of the defence raised by the accused, or that all evidence tending to show a disposition towards a particular crime must be excluded unless justified. In the particular case the court held that evidence of previous similar acts of sexual perversion was admissible to show the nature of the act done by the accused. The court took the view that the accused should not by confining himself at the trial to one particular issue be able to exclude evidence that would be admissible and fatal if he ran two defences.

The Judicial Committee of the Privy Council in *Noor Mohammed* v. *R.* [1949] A.C. 182, refused to accept the view expressed in

R. v. *Sims* that the admissibility of evidence of similar acts could be determined without reference to the nature of the defence. They referred with approval to *Thompson* v. *R.* [1918] A.C. 286, where Lord Sumner said: "Before an issue can be said to be raised, which would permit the introduction of such evidence so obviously prejudicial to the accused, it must have been raised in substance if not in so many words, and the issue so raised must be one to which the prejudicial evidence is relevant." (In *Thompson's Case* evidence of "similar acts" was admitted to prove identity in a case of an abnormal sexual crime where a defence of an alibi was raised, and Lord Sumner conceded that it was paradoxical that a man whose act is so markedly wicked as to admit of no doubt about its character (and merely denies the act) may be better off in regard to admissibility of evidence than a man whose acts are, at any rate, capable of having a decent face put upon them (when evidence of "similar acts" might be admissible as proving intention), and that the accused can exclude evidence that would be admissible and fatal if he ran two defences by prudently confining himself to one.) The Privy Council in *Noor Mohammed's Case*, while disapproving of the principle laid down in *Sims' Case* and accepting the views expressed in *Thompson's Case*, added one important qualification to the rule laid down by Lord Sumner. They considered that evidence of "similar acts" could not be excluded merely because the accused set up no defence other than a general denial of the crime alleged. An accused person could not exclude evidence of "similar acts" merely by saying: "Let the prosecution prove its case, if it can." One may look not only at the defence raised but at the facts and circumstances of the particular offence charged. If those facts and circumstances are consistent with innocent intention then further evidence of "similar acts" may be adduced to show guilty intention.

In *Hall's Case* Lord Goddard accepted the criticism of the Privy Council of the decision in *Sims' Case* and agreed that evidence of "similar acts" must be excluded unless justified in the particular case. He emphasised, however, that no doubt had been thrown by the Privy Council on the view that evidence of "similar acts" was admissible to show that particular conduct was of a guilty and not an innocent nature. The court further held that the decision in *Thompson's Case* (where evidence of "similar acts" was admitted to show identity) was just as relevant where the defence was "I have never seen the complainant before in my life," as where the defence was, as in *Thompson's Case*, an alibi. Lord Goddard said: "The expression 'identity' means that the evidence of the prosecution goes to show that the witness for the prosecution is speaking the truth when he says 'That is the man who did these indecent things to me'."

The decision in *Hall's Case* left the reader very doubtful when evidence of "similar acts" should properly be excluded. If evidence

of "similar acts" may (anyhow in the case of abnormal sexual crimes) be admitted to prove "identity"—in the wide sense laid down by Lord Goddard, and also to prove that acts of a possibly innocent nature were of a guilty nature, when may it be excluded?

The decision of the House of Lords in *Harris* v. *D. P. P.* provides the answer to this question. Viscount Simon explains the decision in *Sims' Case* as meaning no more than that the prosecution may advance proper evidence to prove its case without waiting to ascertain what is the line adopted by the defence. There is, however, another principle which safeguards the accused from the too easy introduction of evidence of previous conduct tending to his prejudice. In *R.* v. *Jenkins* (1945) 31 Cr.App.R. 1, the Court of Criminal Appeal laid it down, dealing with the allied topic of cross-examination on a prisoner's previous convictions that, even when such cross-examination has been rendered admissible in law by the nature or conduct of the defence, the presiding judge has a discretion to disallow it on the ground that it may be fraught with results which immeasurably outweigh the results of questions put on behalf of the prisoner. This principle emerged somewhat shaken from *Noor Mohammed's Case*, where the Privy Council remarked that "cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible." Evidence may be unduly prejudicial to the accused even though the ground for admitting it may not be "tenuous." The House of Lords has restated the principle in clear and helpful terms which leave a proper discretion to a presiding judge: "A criminal trial in this country is conducted for the purpose of deciding whether the prosecution has proved that the accused is guilty of the particular crime charged, and evidence of 'similar facts' should be excluded unless such evidence has a really material bearing on the issues to be decided." Again it is "the duty of the judge when trying a charge of crime to set the essentials of justice above the technical rule if the application of the latter would operate unfairly against the accused. If such a case arose, the judge may intimate to the prosecution that evidence of 'similar facts' affecting the accused, though admissible, should not be pressed because its probable effect 'would be out of proportion to its true evidential value.'"

G. Godfrey Phillips.

Insanity as a Defence in a Civil Action of Assault and Battery

"What degree of mental illness, if any, can constitute a defence to an action in tort, and in what circumstances?" In these terms

Stable J. succinctly posed the question he was asked to determine in *Morriss* v. *Marsden and Another*.[1]

The textbook writers will therefore no longer be able to recite accurately: "There is no reported instance of an action of tort ever having been brought in this country against a lunatic. . . ."[2]

The facts of *Morriss* v. *Marsden* raised the issue in an acute form. The defendant was a catatomic schizophrenic and a certifiable lunatic. In 1945 he had been detained as a private patient in a mental hospital but was released after a month because the reception order proved to be invalid.[3] His mother, on signing the authority of discharge, undertook to be responsible for his proper care and treatment. In 1949 the defendant was staying at a Brighton hotel when, without the slightest provocation, he attacked the manager with a "blunt instrument." He then fled and was subsequently apprehended by the police at Southampton. When tried on indictment on a charge of criminal assault, he was found unfit to plead and was directed to be detained during His Majesty's pleasure.

The hotel manager now brought this *civil* action against the defendant and his mother claiming (i) damages from the defendant for assault and battery, and (ii) damages from the mother for negligence and breach of duty. Stable J. awarded a total of over £5,800 damages on the first claim but held there was no evidence to support the second.

It is rather surprising that the tortious liability of a lunatic for his wrongful acts has never been authoritatively defined in English law. Modern text-writers adopt a uniform view, of which *Clerk and Lindsell* is characteristic, *viz.*[4]:

> ". . . it is apprehended that lunatics are liable for torts to the same extent as sane persons, provided that the torts are committed by them while in that condition of mind which is essential to liability in sane persons. In its absence, it would appear that there is no voluntary act at all. In cases where liability depends on some specific state of mind (*e.g.*, malicious prosecution, libel on a privileged occasion), lunacy may be strong evidence to show that the necessary element is lacking and may therefore be a good defence."

Thus it would appear that a lunatic might escape tortious

[1] [1952] 1 All E.R 925. The facts of the case limited the arguments to the question of a lunatic's liability in trespass to the person. For admirable discussions of the wider question see, *inter alios*, Bohlen, *Studies in the Law of Torts* (1926) at pp. 543 *et seq.*; and W. G. H. Cook, "Mental Deficiency in Relation to Tort," 21 Col.L.R. 333 (1921).

[2] *Clerk and Lindsell on Torts*, 10th ed. (1947) at p. 86. *Halsbury's Laws of England*, 2nd ed (Hailsham) Vol. 21, s 498, cites the same passage from the 8th ed. But note that in *Cross* v. *Andrews*, Cro.Elix. 622 (1598), an innkeeper's plea of insanity in defence to an action on the case by a guest, for failure to keep the guest's goods in safe custody, was rejected.

[3] On the ground that his brother who applied for it was under 21 years of age at the date of application.

[4] *Loc. cit.*, *supra*.

liability if (a) the condition of his mind rendered the act involuntary, or (b) he was mentally incapable of forming some specific intent required as an essential element of the tortious act in question.

If this analysis of the supposed legal position is kept in mind, it will be appreciated that *Morriss* v. *Marsden* does little to clarify this obscure corner of the law.

Stable J., in an unreserved judgment, came to the following conclusions of fact, *viz.*:

(i) That at the time of the assault the lunatic was neither in a condition of automatism or trance, but that *his mind directed the blows he struck*, and

(ii) He was a catatomic schizophrenic and a certifiable lunatic who (a) knew the nature and quality of his act, but (b) whose incapacity of reason arising from the disease of his mind was of so great a character that he did not know that what he was doing was wrong (at pp. 926–7).

Having made these determinations of fact, the judge directed his attention to three main points, *viz.*:

(i) Whether the *M'Naghten* rules determine civil, as well as criminal, responsibility.

Stable J. had no difficulty in rejecting the rules as "the only test" (*ibid.*, at p. 927) of civil responsibility. Clearly they were inapplicable as a test of contractual or testamentary capacity, and there was nothing in *White* v. *White* [1949] 2 All E.R. 339 (a divorce petition based on the alleged cruelty of an insane respondent) to suggest to the contrary. By limiting his rejection of the rules to a denial of their exclusiveness as a test of responsibility, the learned judge avoided the broader query as to whether the so-called rules have any relevance to civil law *at all*. It is suggested that they have none and that the application of the rules by the Court of Appeal in *White* v. *White* reflects the lingering concept in the judicial mind (a concept not shared by Denning L.J.[5]) that divorce proceedings have a criminal flavour.

(ii) Whether any specific intention is required to commit an assault, and if so, whether in this case the lunatic was capable of forming such a specific intention.

It is now generally considered correct to assert that proof of intention or negligence is essential in all actions of trespass. Much of the old learning about the strictness of liability in trespass has been recently shelved in the archives of archaic legal thought. Bohlen, for example, has admirably outlined the gradual grafting of a "negligence" element, *via* the concept of inevitable accident, onto the old fertile mother of actions.[6] The generally held view

[5] And see Pearce J. in *Lissack* v. *Lissack* [1950] 2 All E.R. 283 at 287.

[6] *Loc. cit.*, at p. 550. "Therefore, in trespass for harm directly done to the bodily condition of another, the liability ceased to be a liability imposed without fault and was imposed, as in trespass on the case for harm

is that the Court of Appeal affirmed this development in *National Coal Board* v. *Evans*.[7]

But in concluding that intention or negligence is an essential element in tortious liability for trespass, Stable J. states,

> "On the whole, I accept the view, that *an intention—i.e., a voluntary act*, the mind prompting and directing the act which is relied on as in this case, as the tortious act—*must be averred and proved*" (at p. 927).

With respect, it is submitted that there are two fallacies in this statement, *viz.*:

(a) The learned judge appears to have confused two different mental elements, *i.e.*, intention and volition, by defining one in terms of the other. If a man's mind "directs the blows he strikes" the act of striking is "intentional" but it is still possible for that same act to be "involuntary." In tort, as in crime, there is no invariable equation of volition and intention.[8] In other words volition is a necessary concomitant of every tortious act; intention is an ingredient of most but not all torts.

"Volition," *i.e.*, "a certain psychic awareness" (Paton, *Textbook of Jurisprudence*, 1946, at p. 284), is essential before there can be a juridical act at all. In actions of tort it is always open to the defendant to prove his act was involuntary, even in those cases of strict liability where "intention" is irrelevant. In *Weaver* v. *Ward* one of the illustrations given of trespasses utterly without fault was ". . . as if a man by force take my hand and strike you."[9] Likewise the examples given by Stable J. of acts done by an automaton or a somnambulist fall into the same category of involuntary acts.

"Intention," however, is a distinct thing which has acquired a technical meaning. It "signifies full advertence in the mind of the

indirectly done thereto, only if the defendant was at least guilty of 'negligence.'"

[7] [1951] 2 All E.R. 310; see 15 M.L.R. at pp. 79 and 84. N.B.—It can be argued that the judgments in *Evans' Case* on this point were *obiter* but it is suggested that they correctly reflect the modern view as to liability in trespass. Mr. P. A. Landon, the learned editor of *Pollock on Torts*, 15th ed., at p. 128, is satisfied that the case accepts the authority of *Stanley* v. *Powell*. He comments, ". . . all that one can do is to wring one's hands and to note this recent case as a striking illustration of the old maxim *communis error facit ius*. And the point is still an open one for the House of Lords."

[8] Austin was at pains to emphasise this distinction between will, *i.e.*, volition, and intention. He complained that ". . . numerous writers upon Jurisprudence . . . employ 'will' and 'intention' as synonymous or equivalent terms. They forget that intention does not imply will, or that the appropriate objects of certain intentions are not the appropriate objects of volition." Jurisprudence, at p. 421, cited with approval by Keeton, *Elementary Principles of Jurisprudence*, 2nd ed., at p. 206.

[9] Hobart 134 (1616) 80 E.R. at p. 284. It is true that in the same case there is a dictum to the effect that "if a lunatic hurt a man, he shall be answerable in trespass." But as Bohlen points out (*loc. cit.* at p. 552), the case was decided at a transitional point in English legal history when the courts were only tentatively moving away from the harsh strictness of the liability with fault concept.

defendant to his conduct, which is in question, and to its consequences, together with a desire for those consequences . . . ," though there may be an irresistible presumption of intending the necessary or natural consequences of one's acts.[10]

Therefore while Stable J.'s finding of fact, that the lunatic's mind " directed the blows he struck," was a finding that the act was intentional, it might have been argued on behalf of the defendant that his diseased mind rendered the act involuntary, and therefore non-tortious.

If the dictum cited above from *Weaver* v. *Ward* is valid, it is difficult to appreciate why a distinction should be made if it is a diseased brain rather than a human agent which guides the striking hand.

(b) In the same passage the learned judge states that the intention " must be averred and proved." This suggests that the onus of proof in an action of trespass is on the plaintiff. Is it true that the plaintiff must show that the defendant acted intentionally or negligently? To the writer's knowledge there is no authority for placing the burden of proof on either party. The Court of Appeal in *National Coal Board* v. *Evans* did not express an opinion on the point. But in the absence of authority it seems more logical to accept the usual view that in an action of trespass the onus of proof is on the defendant to show lack of intention or the absence of negligence on his part—in other words, to plead inevitable accident. In fact it is now almost true to say that the essential difference between actions of trespass and of negligence is in the placing of the burden of proof.

A further point raised in argument by learned counsel is worthy of note solely because Stable J., while rejecting it, found it " attractive." This was an attempt to distinguish the instant case from *Stanley* v. *Powell*[11] and *Holmes* v. *Mather*[12] on the ground that,

> " These cases may well be different from the present matter where the act complained of was a trespass, as direct an act of violence as possible. The injuries were not the indirect result of a legitimate activity gone wrong, but were the direct result of illegal behaviour, which was wrongful from the beginning and could not conceivably be anything else. *The distinction may be succinctly stated as being conduct tortious in its very essence and conduct innocent in itself, but becoming tortious by the addition of some ingredient such as intention, heedlessness, or malice* " (at p. 928).

With respect it is submitted that there is no authority for such a distinction which has only its subtlety to commend it.

(iii) The final matter to be considered was whether, " granted that the defendant knew the nature and quality of his act, it is a

[10] *Winfield's Law of Tort*, 5th ed , pp 19–20.
[11] [1891] 1 Q.B. 86.
[12] (1875) L.R 10 Exch 261.

defence in this action that, owing to mental infirmity, he was incapable of knowing that his act was wrong" (at p. 928).

The learned judge concluded that it was no defence since "where there is the capacity to know the nature and quality of the act, that is sufficient although the mind directing the hand that did the wrong was diseased" (*ibid.*).

It is indisputable that ignorance of the wrongful nature of the act is no defence in tort. On the other hand, it is submitted that both (a) the capacity to know the nature and quality of the act, and (b) knowledge of wrongdoing, are two factors to be taken into consideration by the court in determining whether the defendant is capable of forming a culpable *intention*.

Moreover, it should not be assumed that mere knowledge of the nature or quality of one's acts is necessarily sufficient to constitute "a *voluntary* act, the mind prompting and directing the act which is relied on" (at p. 927). To make such an assumption would be to equate "*sciens*" with "*volens*."

The essential question in *Morriss* v. *Marsden* was whether, granted that the lunatic had a culpable intention, this catatomic schizophrenic could be held to have performed a *voluntary* act. In these spheres of learning where medical and legal theories come into contact, the results are rarely happy. But it is suggested that the lawyer should not ignore completely the indisputable advances in medical science. Professor Paton rightly comments that "Medicine, psycho-analysis, and psychiatry are opening new doors and the law will gradually be forced to reconsider the theories on which its analysis of an act is based, although it is as yet premature to seek in the new learning for definite and accepted hypotheses which can be made the basis of a new legal approach."[13] *Morriss* v. *Marsden* might suggest that a greater awareness by the lawyers of such "new doors" would be beneficial to the health of the Common Law.

ERIC C. E. TODD.

SALE OF GOODS—ILLEGALITY

B. & B. Viennese Fashions v. *Losane* [1952] 1 All E.R. 909 is another illustration of the practical difficulties which may result from a failure to attend to adequate theoretical analysis. Realistic analysis of actual commercial transactions discloses, as I have previously shown, that a contract for the sale of goods is built up around promises by a vendor to deliver and a purchaser to accept particular goods which are either expressly or implicitly specified by them. Without clear realisation of the concept of defined contract goods there is an inadequate scheme for the classification of actual contracts. The limitation of categories to conditions and

[13] Paton, *Textbook of Jurisprudence* (1946) at pp. 283–4.

warranties creates a Procrustean bed in which different forms of contracts of sale are rudely handled. *Cheshire and Fifoot* does proclaim the existence of contractual terms which are neither conditions nor warranties, but fails to make clear all the distinctions between different situations. We are told that where there is a promise to deliver a racehorse the delivery of a carthorse is neither the breach of a condition nor of a warranty, but is "outside the contract altogether" (*Cheshire and Fifoot*, 2nd ed., p. 112). However, the phrase "a promise to deliver a racehorse" contains an ambiguity, similar to that pointed out by the court in *Smith* v. *Hughes* as occurring in the phrase "contracting for old oats." A promise to deliver an object which is defined as a racehorse has as its correlative a promise by the purchaser to accept such an object. There may, however, be a contract under which a vendor promises to deliver an object defined as a horse, and a purchaser promises to accept a horse *provided, however*, that it is a racehorse.

It is the first type of promise to which *Cheshire and Fifoot* refers. The analysis of the situation where non-contract goods are delivered may, however, be carried further. Where there is a contract of the first type, not only does the vendor who delivers a carthorse act outside the contract, so too does the purchaser who takes delivery of the carthorse. Only in the second type of contract is there a true "waiver" by a purchaser, *viz.*, the waiver of a condition. The acceptance of a carthorse may, according to circumstances, operate in various ways. One way in which it *cannot* operate is to convert delivery of a carthorse into performance of the promise to deliver an object defined as a racehorse.

In the instant case these basic, but simple, considerations were ignored, and in consequence the court found itself in difficulties in arriving at the correct solution of the case before it. There was a "bargain for the sale of non-utility jackets." The vendor delivered utility jackets, of which the purchaser took delivery in ignorance of the fact that they were not non-utility jackets. The jackets contained no utility marks, nor had an invoice been delivered appropriate for the sale of utility jackets. The vendor sued for the price fixed in the original contract. The defence, on which the purchaser succeeded in the Court of Appeal, was one of illegality. The illegality relied on was a breach by the vendor of art. 10 (1) of S.R. & O. 1947, No. 2642. This article provides:

> "A manufacturer of controlled goods shall in relation to the supply in pursuance of a contract of sale of any such goods, being utility goods manufactured by him, to a person other than a retail customer furnish to that person, not later than seven days after the supply of the goods, an invoice containing the particulars hereinafter specified."

The county court judge held that the contract was legal in its inception, and, distinguishing *Anderson, Ltd.* v. *Daniel* ([1924] 1 K.B. 188) that subsequent illegality did not avoid the contract.

The breach of contract constituted by the delivery of the utility jackets was waived when they were accepted by the purchasers. He gave judgment for the vendor.

In the Court of Appeal the view taken was that illegality arising from the breach of art. 10 (1) so tainted the contract that the vendor could not recover. *Anderson, Ltd.* v. *Daniel* was regarded as indistinguishable. Counsel for the vendor, it may be inferred, argued that there had been no breach of art. 10 (1) on the basis that the article only applied to the supply of utility goods in pursuance of a contract of sale of utility goods. Evershed M.R., considered this to be an unnatural reading of the article. The natural reading, he maintained in effect, was this: "a manufacturer of controlled goods shall in relation to the supply of any such goods, being utility goods manufactured by him (which supply was in pursuance of a contract of sale) . . . " "Any other reading," he said, "would leave the words 'in relation to the supply' in the air." In my opinion the reading adopted leaves "contract of sale" in the air: the natural reading is to take the phrase "any such goods, being utility goods" as clearly qualifying "contract of sale," even though it also qualifies the phrase "in relation to the supply." It is an artificial reading which makes the phrase "of any such goods, being utility goods" qualify only "supply" without qualifying "contract of sale." Such a reading places brackets around "in pursuance of a contract of sale," and produces an unusual construction. In any case the possibility of double qualification cannot be entirely ignored, as it was by the Master of the Rolls.

Jenkins L.J. characterised the delivery of the utility jackets as "an illegal performance in view of the provisions of art. 10 (1)." He then proceeded, "The defendant firm accepted the goods so delivered and disposed of them. In my judgment, that course of events must taint the whole contract with illegality, just as much as if it had been in origin a contract for the sale of utility garments. To hold otherwise would produce this absurdity. The plaintiff comes to the court and claims payment for goods sold and delivered. To make out that claim he must show delivery of the goods, and the delivery he relies on is the delivery of utility garments without an invoice. Thus, the plaintiff must either admit that he is seeking to recover on an illegal contract or else he must set up his own breach of contract and say that this delivery of utility garments without an invoice, although illegal, was not a delivery in pursuance of the contract at all, with the surprising consequence that, notwithstanding the breach of contract, the illegality, the plaintiff is entitled to recover the contract price. It seems to me that this is an absurd result."

Absurdity is, however, not avoided by the court's solution of saying that the contract was tainted with illegality, for that conclusion produces the absurdity that a purchaser in a similar case

could not sue for breach of contract. The "surprising consequence," which it is said by Jenkins L.J. follows from saying that the delivery of the utility garments was not a delivery in pursuance of the contract, is, it is submitted, not a consequence at all. A vendor cannot recover the contract price by showing that he has not delivered the contract goods.

The solution of the case was indeed simple: and called for no strained interpretation of art. 10 (1). The original contract was for goods defined as non-utility jackets. The delivery of utility jackets was not a performance of the contract. The vendor suing for the original contract price could be met simply by the defence that the contract goods had not been delivered. The effect of the delivery and acceptance of the utility jackets has, however, to be considered. At most the vendor could say that such delivery and acceptance constituted a *new* contract. This new contract was one for the sale of utility jackets. Perhaps it could be said in one sense that the new contract involved a waiver of the breach of the original contract; but only in the sense of rescinding the original contract and substituting therefor a new contract for the sale of utility jackets. An action on the new contract is met by the plea of illegality, for there is no doubt as to the applicability of art. 10 (1) to a contract for the sale of utility goods. The phrase "in pursuance of" is not restricted to the situation where there has been an antecedent contract of sale. In the result the vendor could not succeed. A purchaser, however, could succeed in a counterclaim in such a case, for it is submitted that the acceptance of utility goods in ignorance of their character could not be taken as giving rise to a contract to rescind the original contract; and the purchaser could not be affected by the vendor's breach, if such it was, of art. 10 (1).

J. L. Montrose.

Divorce—Cruelty—Misdirection

In *Fromhold* v. *Fromhold*, the first divorce case to be heard by a jury since 1939, Wallington J. directed the jury that in order to prove legal cruelty it was necessary to show that there had been injury to health even in a case of physical injury. He further told them that a magistrates' order based on the same facts as those alleged in the petition was nothing to do with them. He ruled as inadmissible the evidence of a witness who said that she had seen bruises and other injuries on the wife-petitioner because it was a complaint which was not made until about a week after the alleged assault. And finally, he did not read out in open court or disclose to the parties the contents of a note which the jury had sent him after they had retired to consider their verdict. On all these four accounts the Court of Appeal have held ([1952] 1 T.L.R. 1522) that the learned judge was wrong.

Singleton L.J. confessed to finding it a little difficult to understand the first misdirection. For "the wife's complaints were that she had been kicked on at least two occasions, so that there were bruises on her legs or on her body; that she had been struck on a hand with a knife in a way which caused a wound or wounds on the hand, and if these complaints were found by a jury to be true, I should not have thought that anyone could doubt that they were within the definition of cruelty as known to the law" (at p. 1525).

As to the magistrates' order, section 7 (2) of the Matrimonial Causes Act, 1950, provides: "On any such petition for divorce the court may treat the decree of judicial separation or the said (magistrates') order as sufficient proof of the adultery, desertion or other ground on which it was granted. . . ." Thus, although such an order is not as useful in a contested case as it is in an uncontested case, "the Legislature provides that the court may receive the order, and may treat it as sufficient proof of the ground on which it was granted. . . . The judge told the jury that the order had nothing to do with them, but that was not an accurate way of putting the wife's case. It would have been right had the judge said 'This order was made by the magistrates and is a factor in the case; it is not conclusive; you will bear it in mind, but you will decide this case upon the whole of the evidence given by both sides' "—*per* Singleton L.J. (at p. 1526).

All three members of the court expressly concurred in holding that Wallington J.'s ruling on the inadmissibility of the proposed witness's evidence was wrong. The rejected evidence should have been admitted as it was relevant to prove the existence and nature of the alleged injuries. For the witness to say she had seen bruises did not amount to evidence of a complaint; it was merely evidence of fact.

However, "the actual statements made by the wife to the witness would not be admissible; they would be hearsay; and being made at some distance of time afterwards would not be admissible as complaints"—*per* Denning L.J. (at p. 1526).

There is no doubt that evidence of complaints by assaulted persons is admissible as an exception to the hearsay rule provided the complaint was made at the first reasonable opportunity. Thus, both the fact that the complaint was made and the particulars of the complaint are allowed in: *R.* v. *Lillyman* [1896] 2 Q.B. 167. But up till now it was generally considered that the admissibility of such evidence was confined only to complaints of sexual offences and to criminal proceedings: *R.* v. *Osborne* [1905] 1 K.B. 551, at 561. Indeed, *Phipson*, 9th ed., says, at p. 181, that the dictum of Bankes L.J. in *Jones* v. *S. E. Ry.* (1918) 87 L.J.K.B. 775, at 778, that such evidence is admissible on all charges of violence, civil or criminal, is not sustainable. Now apparently it is not the learned Lord Justice but the learned textbook writer that is not sustainable, for the Court of Appeal judgments make it clear that had the

petitioner complained sooner to the witness these complaints would have been receivable in evidence. Although it does not appear in the report, Mr. Simon, Q.C., for the wife petitioner, had referred in the course of his argument to *Berry* v. *Berry* (1898) 78 L.T. 688, in which Jeune P. had upheld the anomalous practice of the Divorce Court in allowing a witness to give evidence of the fact (though not the particulars) of a wife's complaint of her husband's cruelty without inquiring whether it was made at the first reasonable opportunity. But the court expressed their disfavour of this authority and Mr. Simon did not press his argument. *Berry* v. *Berry* is most likely no longer good law.

The fourth respect in which Wallington J. erred was in not reading out the jury's note. In commenting on this Singleton L.J. referred to *R.* v. *Green* [1950] 1 T.L.R. 64 and *R.* v. *Furlong* [1950] 1 T.L.R. 558, and said: "Both those cases arise on the criminal law. I do not know why there should be any difference of practice between cases under the criminal law, or under the civil law, or in matrimonial causes. If there be a communication between judge and jury, prima facie the litigants on both sides and their counsel are entitled to know what that communication is" (at p. 1524).

Though it again does not appear from the report, Wallington J. had said in his summing up that this was a case in which there was no corroboration. Mr. Simon contended that this was misdirection since the evidence as to the bruises, if rightly admitted, would in fact have amounted to corroboration. He argued that corroboration was: "facts which tend to render more probable the truth of a witness's testimony on any material point" (*Phipson*, 9th ed., at p. 511). The need for such facts also to implicate the accused only applied to the corroboration of an accomplice in a criminal proceeding: *R.* v. *Baskerville* [1916] 2 K.B. 658. Therefore, the fact that the evidence of the instant witness did not implicate the husband did not prevent it from being corroboration as it rendered the wife's testimony more probable on the material point of the existence of the physical injuries.

Singleton L.J. refused to say anything on this point. But Denning L.J. held that the rejected evidence would have been "corroboration in the sense in which it is used in the Divorce Court" though it would not be "corroboration in the sense in which that word is used in the criminal courts" (at p. 1526). Hodson L.J. did not agree with this new-found double meaning of the word corroboration. Though agreeing with Singleton L.J. that the matter did not now fall to be decided, he was of the view that corroboration in all cases had to implicate the accused and that such evidence as was in issue here could only amount to corroboration if the parties were living together at the time since such a contemporaneous cohabitation provided a sufficient linking with the party charged to implicate him.

That Hodson L.J.'s view is correct and that the strict meaning of corroboration should prevail even in the Divorce Court is perhaps borne out by dicta of Sir Boyd Merriman P. in *D. B.* v. *W. B.* [1935] P. 80. In that case the learned President held that evidence of the fact of a complaint by a wife to her doctor of her husband's cruelty, though admissible as relevant to her nervous condition at the time, was "no evidence whatever implicating the husband in connection with the alleged acts . . . if corroboration was necessary I think the justices were right in saying that there was none" (at p. 85).

FENTON BRESLER.

ARREST

THE decision of the Court of Appeal noted *ante*, Vol. 14, p. 489, has been reversed by the House of Lords: *John Lewis & Co. Ltd.* v. *Tims* [1952] 1 All E.R. 1203. Apart from special statute, a person arrested need not be taken before a magistrate forthwith, but only within a reasonable time, and it is not unreasonable for the arrester to delay (*a*) to get the decision of his superior as to whether to prosecute or (*b*) in order to give the arrested person an opportunity of offering an explanation.

The decision emphasises the chaotic character of the law of arrest, because it seems that if the arrest is made under some of the special statutes which use the word "forthwith," even a reasonable delay invalidates the arrest.

The decision below was called *Tims* v. *John Lewis*, and since Tims was the plaintiff, this is the name that tends to stick in the mind. Will not someone alter the inconvenient practice of reversing the names of parties in the House of Lords? It frequently involves delay in tracing a case in a work of reference. This appeal is addressed particularly to the Editor of the *Law Reports*: if he will use his authority to keep the case to the same name throughout its career, other reports may summon the courage to follow suit.

GLANVILLE WILLIAMS.

"MY EXECUTORS' DECISION SHALL BE FINAL"?

THERE have recently been instances in several fields where the courts have shown considerable vigour in preserving their jurisdiction. One of the outstanding, and perhaps the most controversial, of these cases is *Re Wynn's Will Trusts* [1952] 1 All E.R. 841, where the testator had attempted to avoid loss to his estate as a result of construction summonses and the like. By his will he empowered his executors to determine what articles passed under any specific bequest, and "whether any moneys are to be considered as capital or income and how valuations are to be made . . . and to determine

all questions of doubt arising in the execution of the trusts of this my will . . . and I declare that every such determination shall be conclusive and binding upon all persons interested." On a question of the apportionment of the proceeds of sale of some timber this clause was held invalid on the grounds (a) that it was contrary to public policy as excluding the jurisdiction of the court, and (b) that it imposed a condition repugnant to the nature of the gifts in the will.

The grounds of repugnancy (that the discretionary powers could defeat the expectations of beneficiaries and were thus repugnant to the gifts) are perhaps the least satisfactory, though in applying this doctrine in the present case, Danckwerts J. was following *Re Raven* [1915] 1 Ch. 673, where the power given was to determine the identity of a beneficiary. It should be remembered that beneficiaries are merely claiming a gift, and as Uthwatt J. said in *Re Tankard* [1942] Ch. 69: "Beneficiaries take their interest under the will only on the terms of the will," and "Beneficiaries cannot complain if the terms of the will are adhered to." On this basis there can logically be nothing repugnant to the nature of the gift in a condition which is of the essence of the gift. If the testator chooses to make the receipt of his bounty uncertain the beneficiaries may be unhappy but they suffer no loss of anything which was theirs by right. It would, it seems, be as reasonable to regard as repugnant the discretionary part of a discretionary trust on the grounds that such a discretion makes any benefit to the beneficiaries entirely dependent upon the goodwill of the trustee. To give a power to trustees to apportion can scarcely be regarded as a more serious potential deprivation of the beneficiaries' hopes than to give a power to determine whether the beneficiary shall receive anything or nothing. Yet by the cases one gift is good and one bad. It is true that there is between them something of the distinction between gifts upon condition and determinable interests, but that distinction is often one without substantial merit, depending on the technique of drafting. The end that cannot be achieved by condition because of "repugnancy" can be obtained through a determinable interest. There seems in wills to be little point in preserving rules and distinctions which are capable of defeating the clear intent of the testator merely because of faulty drafting.[1]

In the present case the application of the doctrine is particularly unhappy. It stops the trustees making a final apportionment and therefore leaves it to the law to perform that task. The result between beneficiaries could be precisely the same whichever course were followed. It must also be remembered that there is nothing sacred in the apportionment rules of law; they can be entirely

[1] This is particularly true when the rules themselves are, as is the doctrine of repugnancy, unattractive in logic and their operation. See generally the articles by Professor Glanville Williams in 59 and 60 L.Q.R., "The doctrine of repugnancy" and particularly Vol. 60, at p. 82.

excluded, and often are, largely because their intricacy all too frequently involves the expense of litigation if the executor or trustee is to feel secure.[1] If the rules can be excluded there seems little harm in the testator providing his own simpler rules or, since he cannot envisage all possibilities, providing his own machinery for determining the matter, which will be simpler, cheaper and quicker than the machinery of the courts.

The difficulty in providing that machinery lies not only in this doctrine of repugnancy, but in the application of the rules of public policy. The doctrine of repugnancy, if unattractive, is not novel. In the application of public policy there is a certain novelty, the application of a particular head of public policy to wills.[2] The clause failed as contrary to public policy, as being " an attempt to oust the jurisdiction of the court to construe the will and to control the administration of the testator's estate." Authority for this was found in the arbitration cases such as *Czarnikow* v. *Roth, Schmidt & Co.* [1922] 2 K.B. 478. Whether those cases are *in pari materia* may, with respect, be doubted. The power of the court is in arbitration preserved by statute (see *e.g.*, section 21 of the Arbitration Act, 1950), and the position of persons in commercial relationship with one another is hardly the same as that of donor and donee. Further, in wills it has been recognised that a condition that the beneficiary shall not dispute a will is good (*Cooke* v. *Turner* (1846) 15 M. & W. 727), at any rate where, when annexed to personalty, it does not offend the *in terrorem* doctrine. This has been so held, even where the condition was against disputing the validity of a will, yet there can be no greater public interest in the supervision of construction than in the decision of validity of a will. Indeed, it was said by Rolfe B. in that case, " But in the case of a condition such as that before us, the State has no interest whatever apart from the interest of the parties themselves. . . . It matters not to the State whether the land is enjoyed by the heir or the devisee; and we conceive therefore that the law leaves the parties to make just what arrangements they may think expedient as to the raising or not raising questions of law or fact among one another, the sole result of which is to give the enjoyment of the property to one claimant rather than another." With the substitution of tenant for life and remainderman for heir and devisee in that quotation it would seem to cover the present case precisely. If *Re Wynn's Will Trusts* is to stand, these earlier authorities, not hitherto challenged, must be reconsidered.

It is true that it is possible to go too far with such conditions. Thus, in *Re Williams* [1912] 1 Ch. 899, it was held that a clause

[1] This is a matter of increased importance since it is probably generally true that trust corporations are less willing than private persons to take the risk of making wrong decisions. For that no one can blame them, but it does unhappily mean an increase in litigation.

[2] It should be remembered that the clause here in question was not new-fangled, but well enough established to be in all the standard precedent books.

that if proceedings were taken by a beneficiary all costs of parties should come out of the beneficiaries' share did not apply to proceedings instituted when the executors were guilty of wilful default, having withheld capital money for years. Here, it seems is the true limit of public policy, namely that the only essential jurisdiction of the court is to prevent fraud. Added strength is given to this supposition by a Scottish case, *Dundee General Hospital* v. *Walker* [1952] 1 All E.R. 897, where there was a gift to the hospitals "if my trustees shall in their sole and absolute discretion be satisfied that the said infirmary has not been taken over wholly or partly by or otherwise placed under control of the State." These words were used, said Lord Normand, since the testator "wished to make manifest his intention that the trustees' failure to be satisfied should be final and conclusive and not subject to correction by a court of law." In reply to the objection that on this view the testator had committed to his trustees not only the construction of his will but also of a statute, Lord Normand added, "I would not deny that, but no case was cited to us, nor do I know of any which would compel me to treat as invalid the condition as I have construed it," saying also that the words may have been used "solely in order to exclude from the purview of the courts the kind of questions which have occupied so large a part of the time given to this appeal." He was prepared to hold that the decision of the trustees would be final, unless it could be shown that it had been reached dishonestly. That is a far cry from *Re Wynn's Will Trusts*, but the suggested interpretation of *Re Williams* accords with the House of Lords decision.

So far as English testators are concerned *Re Wynn's Will Trusts* means that such clauses must be avoided unless the testator is prepared first to risk his estate in further litigation[4] on their validity, and the present spate of construction summonses is likely to grow. North of the Border other opinions have prevailed, and there may now be added point in draftsmen making sure that the Scottish domicile of their testators can be established so that the material validity of such provisions may be tested by Scottish law.

J. D. B. MITCHELL.

BREACH OF STATUTORY DUTY—CONTRIBUTORY NEGLIGENCE

THE Court of Appeal has no power to overrule its own previous decisions, but it can leave them on the shelf; and this is what has happened to *Vyner* v. *Waldenberg Brothers, Ltd.* [1946] K.B. 50. The latest case on the problem (the burden of proof in actions for

[4] There is one way of distinguishing this case. The summons was taken out by the trustees, and, despite what has been said, there may well be no objection to the trustees themselves seeking the opinion of the court. Unfortunately there is in the report no suggestion that the argument played any part at all in the decision.

breach of statutory duty) is *Watts* v. *Enfield Rolling Mills (Aluminium), Ltd.* [1952] 1 All E.R. 1018, where Denning L.J. expressed the view of the court as follows: "The first burden which is always on the plaintiff is this. He must show that his injury was caused by the relevant danger, *i.e.*, by the danger against which Parliament intended to guard him, such as a circular saw, a flying fragment, a revolving belt, or such like. When that is proved or admitted, then the second thing which the plaintiff must show is that there was a breach of a statutory duty which was intended to guard against that very danger. When both of these matters are proved, the proper inference is that the breach was the cause of the injury unless the occupier of the factory proves that it was not."

The facts of *Watts' Case* were as follows. The occupiers of a factory were under a statutory duty by the Protection of Eyes Regulations to provide goggles where workmen were "cutting out . . . bolts from . . . plant." They broke this duty, and a workman lost an eye when cutting out bolts from plant; but it was not certain whether he lost the eye by reason of a flying bolt or because he hit it against part of the plant. It was held that the workman, having failed to discharge the first burden named by Denning L.J., failed in the action.

This decision is in effect, though not avowedly, a complete reversal of *Vyner* v. *Waldenberg*, which had been followed in *Schwalb* v. *H. Fass & Son, Ltd.* (1946) 175 L.T. 845. The rule in *Vyner* v. *Waldenberg* was that "if there is a definite breach of a safety provision imposed on the occupier of a factory, and a workman is injured in a way which could result from the breach, the onus of proof shifts on to the employer to show that the breach was not the cause. We think that the principle lies at the very basis of statutory rules of absolute duty." This was in a judgment delivered by Scott L.J. in June, 1945, the other members of the court being MacKinnon and Morton L.JJ. By December, 1945, MacKinnon L.J. had changed his mind on this general principle, because in the judgment that he delivered on behalf of the Court of Appeal in *Mist* v. *Toleman & Sons* [1946] 1 All E.R. 189, he severely restricted it. According to *Mist* v. *Toleman*, the principle of *Vyner* v. *Waldenberg* applies only where the statutory regulations are designed to prevent a particular class of accidents, not where they are designed to prevent all or any of a number of classes of accidents; in the latter case there is no presumption to aid the plaintiff. In *Mist* v. *Toleman*, there was a statutory duty to prevent dust, the object of which was to prevent every possible uncomfortable, offensive or injurious effect due to the presence of dust. When a workman contracted tuberculosis, allegedly but not clearly as a result of dust, tuberculosis could not be said to be the particular thing in the mind of the legislature; it was only one of the things. Accordingly, the workman failed in his action.

It may be said without disrespect that this was distinguishing for the sake of distinguishing. No reason was advanced for it, and there is obviously much difficulty in drawing a line between a particular class of accidents and a number of classes of accidents. Suppose that an Order has for its object the prevention of dust, and that the Order expressly declares that it is made in order to prevent workmen contracting tuberculosis, silicosis, and other diseases caused or contributed to by dust. If the Order is disobeyed and a workman contracts tuberculosis, is the injurious effect (tuberculosis) the particular thing in the mind of the legislature, or only one of the things? Does "particular" mean that the injury must be specified by name in the legislation, or does it mean that only one injury must be in the mind of the legislature? Whichever question is asked, why should the answer to it have any bearing upon the incidence of the burden of proof?

Whatever ambit *Mist* v. *Toleman* may have left to the rule in *Vyner* v. *Waldenberg*, it might have been thought that the facts in *Watts' Case* fell within it. The regulations in *Watts' Case* were called the Protection of Eyes Regulations, and they had one and only one object, namely, to protect eyes. Hence, they were, within the formula in *Mist* v. *Toleman*, designed to prevent a particular class of accidents, not to prevent all or any of a number of classes of accidents. This being so, it is mysterious in the extreme that the Court of Appeal failed to apply the rule in *Vyner* v. *Waldenberg*. It may be that the practical conclusion is that that case is in effect overruled, notwithstanding the lip service still paid to it.

However, the law cannot be regarded as certain, because two or three weeks after the decision of the Court of Appeal in *Watts' Case*, Donovan J. applied *Vyner* v. *Waldenberg*, his attention not being called to *Watts' Case*. This was in *Cork* v. *Kirby Maclean, Ltd.* [1952] 1 All E.R. 1064, on appeal [1952] 2 All E.R. 402. A man was working on a platform which, in breach of the defendants' statutory duty, was too narrow and was not provided with guard-rails. The man had an epileptic fit and fell off. Donovan J. held that, since there was a breach of duty, and since the injury, namely, falling, was that designed to be prevented by the regulations, the burden lay on the defendants to show that the accident would have happened even if the platform had complied with the regulations. Since they could not do this, the action succeeded. It is submitted that this result was the right one, and it shows the value of the rule in *Vyner* v. *Waldenberg*.

Another part of the judgment of Donovan J. was plainly wrong. The defendants, the occupiers of the factory, contended that they were absolved from liability because the workman had concealed from them the fact that he was an epileptic and was forbidden to work at heights. Apparently the defence was one of contributory negligence, although the learned judge did not call it that, and if there was contributory negligence the normal result would be not

absolution from liability but apportionment of the damage. However, the judge ruled against the defence, for the somewhat surprising reason that "otherwise the courts would soon be engaged on compiling a list of legally notifiable disorders." On appeal to the Court of Appeal this part of the judgment was reversed, the plaintiff's damages being reduced by one-half under the Contributory Negligence Act. The odd thing is that the Court of Appeal did not discuss the question how Donovan J.'s judgment on the onus issue could be reconciled with their own decision in *Watts' Case*.

GLANVILLE WILLIAMS.

MERCANTILE AGENTS AND THE SINGLE TRANSACTION

IT seems strange that the recent case of *Jerome* v. *Bentley & Co.* [1952] 2 All E.R. 114, should have been decided without any reference to mercantile agents. The plaintiff in that case entrusted a ring to a Major Tatham, who had asserted that he could sell it among his circle of friends. The arrangement was that the Major would sell it, in his own name or in the name of the plaintiff, and retain whatever amount he received for it over the sum of £550 wanted by the plaintiff; or, if he did not sell it within seven days, the Major was to return it. After the seven days had elapsed, the Major sold it to the defendants, a firm of Bond Street jewellers, who resold it the same day. The Major was subsequently convicted of larceny by a bailee, and thereafter the plaintiff offered to accept £100 from the defendants in full settlement of his claim against them in respect of the ring. This offer was not accepted, and a formal demand was made by the plaintiff to the defendants for the return of the ring, but the defendants replied that they had bought it in good faith and had resold it.

The decision proceeded on the ground that, at the time of the sale, Major Tatham had no authority to deal with the ring in any way except for the purpose of its safe custody. The property in the ring did not pass to the defendants, nor had the plaintiff done anything to mislead the defendants whereby he might be said to have "enabled" the Major to occasion the loss of the defendants (within the celebrated dictum from *Lickbarrow* v. *Mason* (1787) 2 T.R. 63), and whereby he would be prevented from setting up his title as against the defendants. Judgment was therefore given for the plaintiff for £250, the assessed value of the ring.

The main argument for the defendants appears to have been that they should have been given notice of the limitation of seven days placed upon the authority of the Major to sell, and that, in the absence of such notice, the plaintiff could not rely on that limitation to prevent the property from passing on the sale of the ring to them. It is, of course, well-established that, where an agent has ostensible authority to deal with goods on behalf of the

owner, secret limitations on that authority, which may have been agreed between principal and agent but are not communicated to the third party with whom the agent deals, cannot operate to render invalid, as against the principal, acts done by the agent within the limits of that ostensible authority. But the learned judge, Donovan J., soon dealt with that argument of the defence by stating shortly, " the defendants knew nothing of the plaintiff . . . they dealt with (Major Tatham) on the footing of a principal selling his own property." How then could they possibly assert that they had been prejudicially affected by lack of notice of the time-limit set upon his authority as agent? Moreover, as the learned judge remarked, he could not help wondering how the plaintiff was to give such notice, " for he did not know to whom out of the whole population Major Tatham would offer the ring."

There are, however, circumstances in which this doctrine of ostensible authority has been allowed to operate even where the agent has not in fact been held out as such by the principal, but has been clothed, as it were, with this ostensible authority by virtue of his office or position, even though he may have been treated as a principal by the third party. An illustration of this development is seen in the case of *Watteau* v. *Fenwick* [1893] 1 Q.B. 346, which was naturally cited by the present defendants. In that case, the defendants were the owners of an hotel which was managed by one, Humble, who had previously owned the hotel himself and whose name was still painted over the door. Under the terms of the agreement between Humble and the defendants, Humble had no authority to buy any goods for the business except bottled ales and mineral waters. In fact, Humble purchased other goods, namely, cigars and bovril, from the plaintiffs, who gave credit to Humble alone, knowing nothing of the defendants. These goods were not paid for, whereupon the plaintiffs discovered that the hotel was owned by the defendants and proceeded to sue them for the price. The learned county court judge gave judgment for the plaintiffs, and this judgment was upheld on appeal to the Queen's Bench Division, where Wills J., delivering judgment for himself and for Lord Coleridge C.J., declared the correct principle to be that " once it is established that the defendant was the real principal, the ordinary doctrine as to principal and agent applies—that the principal is liable for all the acts of the agent which are within the authority usually confided to an agent of that character, notwithstanding limitations, as between the principal and the agent, put upon that authority " (p. 348). And this was so even in a case where the person supplying the goods knew nothing of the existence of a principal. " Otherwise . . . in every case where the fact of there being a principal was undisclosed, the secret limitation of authority would prevail and defeat the action of the person dealing with the agent and then discovering that he was an agent and had a principal " (p. 349).

Donovan J., in the present case, distinguished *Watteau* v. *Fenwick* on two grounds. "In the first place, beerhouse managers are a well-known class of agent. I suppose it is common knowledge that for certain purposes they are or may be the agents of the brewers who own the house. In relation to such managers it is easy to apply the phrase 'the authority usually confided to an agent of that character.' But Major Tatham belonged to no such well-known class of agent." The second ground for distinction was that Humble was indeed an agent of the defendants to buy *some* goods for the principal's business, so that he "simply exceeded an existing authority to buy," whereas "Major Tatham did more than exceed an authority to sell—he usurped it."

With respect, however, it might well be doubted if *Watteau* v. *Fenwick* would in fact have been decided the other way if Humble had had no authority to buy any goods at all and had usurped that authority. According to the reasoning of that decision, a secret limitation as to the nature of acts permitted to the agent is just as ineffective as against a third party as is a secret limitation as to the scope of those acts which are permitted. The vital factor is the "authority which is *usually* confided to an agent of that character." The first ground for distinguishing would appear to be much more satisfactory, in that the principle of *Watteau* v. *Fenwick* may be said to apply only to cases where the agent is one of a well-known class of professional agents or managers acting within the scope of the usual authority of that class of agent. Thus, in *Watteau* v. *Fenwick* itself, at p. 348, Wills J. says: "The cigars, however, were such as would usually be supplied to and dealt in at such an establishment." On the other hand, as Donovan J. expressed it in the instant case at p. 116, "One cannot usefully speak in his (Major Tatham's) case of an act within the authority usually confided to agents such as he."

It is submitted, however, that a more profitable line for the defendants in *Jerome* v. *Bentley* might have been to assert that the Major was in fact a mercantile agent so as to bring into operation the Factors Act of 1889. The objection might be raised that Major Tatham could not possibly be such an agent in view of the description of him given by the learned judge, "simply a private individual, carrying on, so far as I know, no calling at all. . . ." There is, however, the case of *Heyman* v. *Flewker* (1868) 18 C.B.(N.S.) 519, where an insurance agent was held to be an agent within the Factors Act, 1842, although it was only on one particular occasion that he was entrusted with pictures to sell on commission. In delivering the judgment of the Court of Common Pleas in that case, Willes J. said that the term "agent" within the meaning of the 1842 Act included only "persons whose employment corresponds to that of some known kind of commercial agent, like that class (factors) from which the act has taken its

name. The employment of Inman (the insurance agent) did strictly correspond, though in a small way, to that of a factor, because the defendant did not merely entrust him with the possession of the goods for safe custody, but employed him to sell the goods so entrusted to him upon commission" (pp. 527–528).

It is acknowledged that this case was decided on the meaning of the term "agent" within the Act of 1842, and not on the corresponding phrase "mercantile agent," which is found in the Act of 1889; but it is worth while recalling what Stirling J. had to say of this decision in *Tremoille* v. *Christie* (1898) 69 L.T. 888, a case also decided on the 1842 Act. "The judgment was delivered by Willes J., than whom there is no higher authority upon such a question." Stirling J. went on to say that he was bound by that decision on the interpretation of the 1842 Act, in spite of the later decision of *Hastings* v. *Pearson* [1898] 1 Q.B. 62, which held that the Act of 1889 applied only to persons of the class ordinarily carrying on the business of mercantile agents. He conceded, however, that "it may be that when a case similar to *Heyman* v. *Flewker* again arises there may be a serious question whether the provisions of the Act of 1889 are to be applied in the same way as the provisions (of the 1842 Act) were applied in *Heyman* v. *Flewker*, but with that I have nothing to do" (p. 840).

This decision of *Hastings* v. *Pearson* was, however, itself overruled by the Court of Appeal in *Weiner* v. *Harris* [1910] 1 K.B. 285, on the very point of the interpretation of "mercantile agent" under the 1889 Act, and no less an authority than Wright J., as he then was, in the Aubusson tapestry case of *Lowther* v. *Harris* [1927] 1 K.B. 898, considered *Heyman* v. *Flewker* to be still good law. "It is also contended that even if he were an agent he was acting as such for one principal only, the plaintiff, and that the Factors Act, 1889, requires a general occupation as agent. This, I think, is erroneous. The contrary was decided under the old Acts in *Heyman* v. *Flewker*, and I think the law is the same under the present Act" (p. 898).

It must be conceded that the agent in *Lowther* v. *Harris* was the owner of a small business dealing in antiques, principally glass and china, but this fact can hardly be considered vital in view of the general words of Wright J., and, in particular, his approval of *Heyman* v. *Flewker*. Moreover, in *Budberg* v. *Jerwood and Ward* (1934) 51 T.L.R. 99, where a lawyer was entrusted by a friend with a necklace for sale, Macnaghten J. readily accepted the proposition that a man could be a mercantile agent although he had only one customer, but held that the Factors Act did not apply in that case solely because the lawyer was acting as a friend and not in a business capacity, as there was no suggestion of remuneration.

In the light of these authorities, it is surely arguable, to say the least, that Major Tatham was a mercantile agent, and once this

obstacle is cleared, the defendants have a straight run home under section 2 of the Factors Act, 1889, of which subsection (1) enacts that a sale by a mercantile agent who is in possession of goods with the consent of the owner, and who is acting in the ordinary course of business of a mercantile agent, shall be as valid as if it were expressly authorised by the owner, provided that the third party acts in good faith and without notice of the agent's lack of authority; while subsection (2) provides that, once a mercantile agent has been in possession of goods with the consent of the owner, a sale by the agent even after the consent has been determined shall be equally valid, provided that the third party has no notice of the determination of the consent.

The requirement that the mercantile agent should be acting in the ordinary course of business of a mercantile agent was fully discussed by the Court of Appeal in *Oppenheimer* v. *Attenborough & Son* [1908] 1 K.B. 221, where Kennedy L.J. had this comment to make, at p. 282, "It was contended that the expression implies that the pledgee" (for the goods in that case were pledged, not sold, by the agent) "must know that the pledgor was an agent. I do not think that contention well-founded. It seems on the face of it to be a strange contention, because a pledgee ought rather to be more protected if he does not know that the pledgor is an agent than if he knows the pledgor's business to be that of agent." In the opinion of Lord Alverstone in that case, at p. 227, "the words 'acting in the ordinary course of business of a mercantile agent' mean that the person must act in the transaction as a mercantile agent would act if he were carrying out a transaction which he was authorised by his master to carry out." The conduct of the Major in selling the ring will readily fall within this interpretation, especially as it was found as a fact that the defendants acted in good faith, so that there could have been nothing to take the transaction outside the ordinary course of business.

It may be objected that such a finding, that the Major in this case was a mercantile agent, would bring about the startling result that every person who was even once entrusted with goods would be a temporary mercantile agent. In point of fact, it would not have such far-reaching consequences as might at first be feared. The goods would have to be entrusted to the agent for sale, as contrasted with safe custody, hire, use, etc., so that the agent's employment would "strictly correspond, though in a small way, to that of a factor" (*Heyman* v. *Flewker*, *ante*), and they must be entrusted to him for sale at a remuneration (*Budberg* v. *Jerwood and Ward*, *ante*). Furthermore, the situation would arise only where the agent sells in contravention of a limitation placed upon his authority by his principal, such as a limitation as to the duration of his authority, as in our present case, or a limitation as to the lowest price to be accepted by the agent, and this limitation is not

known to the third party. Even in these cases the application of the Factors Act would not invariably produce a new result, for the ground is already covered to some extent, partly by the general doctrine of ostensible authority, where the principal holds out the agent as such to the third party, and partly by the principle of *Watteau* v. *Fenwick*, where the agent is one of a class of professional agents or managers, and in such a case, as we have seen, it is irrelevant that the third party may believe the agent to be the principal.

Such a belief is similarly irrelevant for the application of the Factors Act, *cf.* Buckley L.J. in *Oppenheimer* v. *Attenborough & Son* (*ante*, at p. 229), "The question whether the person with whom the pledgor was dealing believed him to be an agent, or believed him to be the owner of the goods, is a question that is not material for the purposes of the Factors Act." Consequently, once we accept, as we must, that the whole application of the Factors Act is governed by objective, not subjective, standards, *i.e.*, depending on whether the agent is indeed a mercantile agent, and not whether he is known to the third party as such, then, it is submitted, a more logical, and no less just, result is achieved by allowing the Act to operate in such circumstances as those in *Jerome* v. *Bentley*.

C. F. PARKER.

AGENCY AND FRAUD—FURTHER COMMENT

THE decision of the Court of Appeal in *Armstrong* v. *Strain* restores order and logic in the law relating to fraudulent misrepresentation after the disturbance caused by the earlier decision of the same court in *London and County Freehold and Leasehold Properties, Ltd.* v. *Berkeley Property Trust*. The story of this incident has been told in full, and the present position has been explained, by Professor Gower recently, in Vol. 15, p. 282 of this *Review*, so that it is not necessary to do so again. But Professor Gower has added some reflections to his account which call for comment, since they appear inconsistent in aim, and since they do not expose that defect in the law which this decision reveals.

Professor Gower draws attention to the hardship suffered by the plaintiff in *Armstrong* v. *Strain*, who received no compensation for the loss he had suffered other than expressions of judicial sympathy. This situation, one would have thought, called for an exploration of the possibilities of relief for the plaintiff. Indeed, in the last of his three observations Professor Gower pursues this course. But his first and principal comment is one which tends to relieve the defendant and, therefore, to aggravate correspondingly the burden of the plaintiff. Professor Gower doubts whether it is socially desirable or logically satisfying to brand one man as fraudulent where someone else has been fraudulent. This, of

course, amounts to no less than an attack upon the principle of *respondeat superior* in relation to fraud. Professor Gower at once admits that this is now established beyond question, and he concentrates his criticism upon the case of a principal who is held liable in fraud because his agent innocently makes a false statement, and a second agent knows that it is false and that it is being made. This is the situation which arose in the *Berkeley Case*, as now explained. Professor Gower considers it unjust to brand the principal as fraudulent since neither the first nor the second agent would be personally liable for fraud.

But, in the first place, it seems very improbable that the second agent—Addis in the *Berkeley Case*—would escape personal liability, if a plaintiff should prefer to proceed against him rather than against the principal. He has *mens rea* and he has done the *actus reus* through the first agent who, although the agent of the principal, is also the innocent agent (in the sense of the criminal law) of the second agent.

Secondly, it is quite misleading to say the principal is branded as fraudulent if he is held liable to pay damages for the fraud of his agent or servant. The imputation of the acts of an agent to his principal is justified, logically and morally, by the principal's authorisation, and in the more common case of vicarious liability for a servant there is by definition no question of stigmatising the master.

Professor Gower's second observation is concerned with the fears expressed by Lord Justice Singleton that *Armstrong* v. *Strain* might lead to difficulties in the case of a company "which can only speak or act through its agents or officers." Lord Justice Singleton here seemed to have fallen into the common error of imagining that a legal person can only act through agents or servants. But Professor Gower is not content to correct this and to point out that companies can act *in person* through their organs, such as the board of directors. He also suggests that the act of each member of the governing body should be treated as if done with the knowledge possessed by all the other members.

It is not quite clear whether the proposed rule under which a company would not "escape liability for the misstatements of one managing director on the ground that he was ignorant of facts known to another" is to apply even where the other did not know that the statement was being made. If not, Professor Gower's suggestion would achieve no more than what would follow from looking upon directors as agents of the company. As it is intended to provide an additional safeguard against companies escaping liability, knowledge that the statement is being made cannot, therefore, be thought essential. Read in this sense the suggestion certainly breaks new ground. But it deals with the states of mind of directors precisely in the way in which, as Mr. Justice Devlin has demonstrated, the states of mind of agents

cannot be treated, namely, it adds one innocent state of mind to another equally innocent in order to get a dishonest state of mind as the result. The notion of the collective mind of the governing body of a company cannot be used in answer to this. The mind of a company is, after all, only a fiction, useful to distinguish between directors and subordinate officers but dangerous if employed for other purposes. In practice, Professor Gower's suggestion might impose an almost unbearable degree of caution upon directors, especially if it is remembered that a company has organs apart from its board of directors.

In his final comment on *Armstrong* v. *Strain* Professor Gower regrets that the plaintiff did not attempt to ask for rescission, a claim which could only be defeated by the discredited rule in *Angel* v. *Jay*. Although one would welcome the final disappearance of this rule, it is doubtful whether rescission would be an adequate remedy for the plaintiff. The right to rescind for innocent misrepresentation can be lost for many reasons and, in any case, it will not compensate the plaintiff for his injuries. To recover such compensation the plaintiff must attempt strict proof of fraud. Although this attempt failed in the present case it might have been possible to prove negligence. But as damages cannot be recovered for negligent misrepresentations the plaintiff in cases of this kind is forced into an action for fraud. The defect of our law which is illustrated by this case is, therefore, not the rule in *Angel* v. *Jay*, but the denial of damages for negligent misrepresentations.

This denial was understandable when *caveat emptor* prevailed and when contributory negligence was an absolute defence. These and many other rules which showed that the individual was expected to be able to look after his own interests have had to be abandoned or qualified. The changed conditions which brought about these developments are also seen in that an enormous number of transactions are now conducted between parties of whom one acts in person whereas the other is assisted by numerous servants and agents. This indicates disparity of bargaining resources. At the same time, mistakes may occur leading to misstatements which could not have been made if the negotiations had been conducted in person. This danger grows in proportion to the size and complexity of the organisation employed. It is clearly unjust that the risk should be made to fall on the weaker of the parties and, indeed, paradoxical that the burden of this risk should be heaviest where the inequality of bargaining strength is most pronounced.

This paradox may have inspired Lord Justice Singleton's fears of difficulties in the case of misrepresentations made on behalf of companies, it may even have contributed to the decision given in the *Berkeley Case* (*cf.* the comment on this decision in 1 M.L.R. 149). *Armstrong* v. *Strain* has decided that the solution cannot be

sought in relaxing the rules concerning fraud. It has, it is submitted, also demonstrated that it will be found in abolishing the rule recently affirmed in *Candler* v. *Crane* [1951] 1 All E.R. 426.

J. Unger.

[Mr. Unger perhaps understates the value of rescission, having regard to the wide powers of the court to order restitution. Had the Armstrongs been able to return the remains of the bungalow and to get back the purchase price they would presumably have been reasonably content or, at any rate, less discontented than they must now be.—L. C. B. G.]

REVIEWS

KENNY'S OUTLINES OF CRIMINAL LAW. An Entirely New Edition. By J. W. CECIL TURNER, M.C., M.A., LL.B. [Cambridge University Press. 1952. liv and 576 pp. 42s.]

IN this work (at p. 28) it is said that "sometimes an adjective is combined with a noun so as to create a composite name with a new and special meaning, and, if so, great confusion will be caused unless this special meaning is made known and the composite noun thereafter employed only in that sense." To the uninitiated, an "entirely new edition" may convey little more than "a new edition," and be as meaningless as "gross" or "criminal" added to the noun "negligence." But let it be proclaimed that the words "entirely new" added to the noun "Kenny" constitute a special novel creation. This is transubstantiation, not just a face-lifting operation. The old elements are there (with all their old compelling charm and attractiveness) but transformed, invigorated, developed, and modernised with all the care and skill of the greatest of our modern English teachers of criminal law. It is a monument of painstaking labours and analytical accomplishment coupled with that profound expertise in judgment of what is required of a students' textbook which can only come from long experience of teaching a subject to generations of undergraduates. To the casual reader Mr. Turner's selection of points for emphasis and of illustrative cases may not signify much. In fact, to those who have had to face the same teaching problems, it is a marvel of ripe judgment. The long wait for the new *Kenny* has been infinitely worth while. We have now a textbook worthy of the subject—and the subject will become more worthy because of the textbook.

In this review there would be little point in traversing again the familiar ground of those topics to which Mr. Turner has made special contributions over the years, which are now infused into the text of this work, such as his analysis of the factual and mental elements of crimes at common law, his views on attempts, manslaughter and the motoring offences, his expositions of debatable problems in the law of larceny, and so on. In this volume there are plentiful points for discussion, but not in a review. But we can note Mr. Turner's appendix on the meaning of "Credit" (which in later editions may well be incorporated in the text) and his able summary, also in an appendix, of rules as to admission of evidence which reveals to the jury facts discreditable to the accused. This may well prove most useful to teachers (and it was Popham C.J. who asked, "Are not the judges of the law professors of the law?") and students: experience will show whether it is not too concentrated for old digestive systems, and for all but the toughest of the young.

The first, and debatable, issue raised by this "entirely new edition" is whether it is desirable to try in one student textbook to cover procedure and evidence as well as the substantive law. There is a risk that the student may accept the expositions of the former subjects as being as complete as that of the latter, which is not, and hardly can be, the case. "Criminal evidence" cannot be divorced from evidence generally; the device of first dealing with general principles and then with rules peculiar to the criminal law works only moderately successfully: it involves a fissure which students may not bridge. (In your reviewer's examining experience, the combination of the substantive law and evidence in one examination subject has generally made of evidence a Cinderella which never gets to the party.) There is much more to be said for providing a good exposition of institutions and procedure

preliminary to that of the substantive law. Evidence seems better left to stand apart as a subject in its own right, save, of course, that some of its leading principles, and some of its special rules peculiarly applicable to particular offences, such as Receiving, must be fully worked into the fabric of the substantive law and in fact miss their rightful emphasis if relegated elsewhere, however logically proper that may appear to be in theory.

Mr. Turner's transformation of the "general considerations" portion of *Kenny* is excellent, whatever minor criticisms of it may be possible. It was wise to transfer the discussion of the nature of a crime to the end of the book and to omit (except for the use of some of the material in it) the chapter on the purpose of criminal punishment, which, however interesting and salutary it might have been, always seemed more fitted for a textbook on legislative science. The new chapter on the principles of criminal liability will assuredly bear fruit in the future of our criminal law by its insistence on a sound analytical approach to its problems. Historians may want to have their say on the condensed portions giving a historical introduction to the subject, and teachers may find that the later efforts to give a historical background to particular points in the text on the substantive law may now and then overburden or send astray some of the weaker brethren, but at large Mr. Turner has been absolutely right in adopting the principle of a combination of the historical and analytical approaches.

In the chapter on principles of liability the separate treatment of the topic of causation is particularly noteworthy. (Some day perhaps consent may receive similar general treatment in the next chapter.) Students may feel some difficulty about the overlap between the treatment of the position where "the victim intervened against himself" and that where the victim is "guilty of contributory negligence" (*Evans* (1812) or *Grimes* (N.S.W.) might help to make the distinction clearer). It was good to see the section on *mala in se* and *mala prohibita*. On voluntary conduct one expected a reference to *Harrison-Owen* (which in fact is mentioned twice in other contexts). Both in this chapter and later in the treatment of Conspiracy one wonders whether it would not be possible to make some further contribution to the elucidation of the topic of *mens rea* in that offence on the basis of Mr. Turner's own valuable contributions to the subject of *mens rea* generally, drawing a distinction between common law and statutory offences requiring *mens rea* on the one hand and statutory offences involving no *mens rea* on the other, and requiring or dispensing with the requirement of *mens rea* in conspiracy on that basis. On recklessness generally and in malice aforethought, the case of the Manchester Fenians has been found useful by students. In contrasting negligence and neglect, the "wilful neglect" provision of the Children and Young Persons Act is a good modern example. In dealing with *Wheat and Stocks* here and later in the chapter on Bigamy, *Thomas* v. *The King* is worthy of mention. Students seem to find the contrast between *Prince* and *Hibbert* helpful in the discussion of general principles.

In the chapter on Variations in Liability, the suggestion that extreme religious views should be treated as insane delusions will not be acceptable in all quarters. In the treatment of mistake, the sentence about the purposeless operations of veterinary surgeons reads a bit oddly without the footnote which Kenny attached to it. In dealing with insanity and drunkenness experience dictates the introduction of a strong caveat to students that the second and third *McNaghten* rules should not be applied in their entirety to the latter, as students are not uncommonly apt to do. Modern events in relation to the exposition of the subject of superior orders in the British Military Manual would have justified something more than a repetition of what the older editions had to say on it. In dealing with the Criminal Justice Act, 1925, s. 47, it would be better to say that the statutory provision *is* (not *was*) what it is, and in dealing with husband and wife generally some reference to rape is desirable if conspiracy, libel and larceny are to be

mentioned at that point. On the topic of necessity, *Bourne* would seem to merit elevation from a footnote to the text. In the section on infants, note 8 on p. 66 is not complete after the Children Act, 1948. With regard to irresistible impulse, it may be worth noting that those responsible for the Infanticide Act thought they were dealing with a condition which is often of that nature; the note on p. 148 is a trifle misleading in suggesting that it is never so.

In the chapter on Preliminary Crimes, the treatment of Incitements is a trifle thin. On accessories, how far does *Lomas* (1913) support the proposition for which it is generally quoted? On p. 90, would it not be desirable to quote authority for the proposition that if a principal is indicted as an accessory he cannot be convicted? In the next edition, would it not be an improvement to advance the chapter on the classification of crimes to an earlier position?

The improvements which Mr. Turner has effected in the exposition of general principles are equalled by his careful re-editing of the chapters on the definitions of particular crimes. The marks of his learning, care and judgment are ubiquitous.

On Homicides, your reviewer is not so happy as Mr. Turner seems to be in putting child-destruction among them. Students are told repeatedly that the *actus reus* of this offence is the same as in other homicides and thrice that it is not. Have we, in fact, in English law some theory comparable to St. Augustine's distinction between *embryo formatus* and *embryo informatus* which enables us to tell when "one not in being" becomes "a human being"? Could the exposition of what is law for the judge and fact for the jury in relation to provocation be made a trifle clearer—if that is possible—for students? They are bound to ask how the imperative rule in *Holmes* is reconcilable with the sufficiency of provocation in any particular case being stated to be a question for the jury. Mr. Turner's suggestion for a statutory definition of Manslaughter (p. 146) is noteworthy. On homicide generally, it may be useful to emphasise a little more that, provided the child is born alive, whether the injury is pre-natal or post-natal is immaterial (with some doubt about pre-natal neglect in Manslaughter). The opening sentence on Child Destruction on p. 148 reads ambiguously—even after 1929 the offence is not punishable as murder nor as infanticide! On the non-fatal offences, it is a little surprising not to have a reference on the topic of consent to *Donovan* (p. 149). On assault it is an improvement to substitute the word "expectation" for "apprehension"; the ambiguity involved in the latter word is eliminated by the change and by a footnote which emphasises that alarm or fear, though common, is not essential: this seems to have been the position in the old robbery case of *Norden*.

In the Bigamy chapter, the introduction suggests that the offence is limited to having a plurality of wives; "spouses" would be better (p. 170). What the Court of Appeal said in *Baindail* v. *Baindail* about polygamous marriages and the law of Bigamy is ignored on p 171. The effect of the Adoption Act on the topic of prohibited degrees may be worth noting because of its novelty.

The treatment of Libel is rightly condensed in a textbook on the criminal law because students are bound to deal with the subject more at length in another course, but obscene publications (on which a former D. P. P. has written) may deserve more attention than a footnote reference.

A feature of the chapter on Offences against Property is the trenchant criticism of *Gott* v. *Measures* (1947). The exposition of the whole subject generally is much improved in this edition. But is it technically correct to say that the common law is now superseded by various statutes on Arson—especially in view of the reference to the common law on the next page (p. 194, n. 1.)? In Burglary, it is difficult to believe that the courts today would draw a distinction between a swing-window and one which opens laterally (p. 198); and under constructive breaking a word could be given on

collusive breaking and entering. To give the argument supporting the last sentence on the time element in Burglary (that the prefatory words "in the night" do not govern the word "entered" in section 25 (2) (a)) would help students: and it has sometimes been stressed that the breaking must be with a view to entry. On p. 202 the title "Punishment" is inapt for a paragraph dealing with a series of separate substantive offences. Your reviewer would prefer the section on Housebreaking to follow the lines of sections 26 and 27 of the Larceny Act.

The unintended suggestion on p. 211 that larceny by a trick is a separate offence is corrected in a later footnote, but it would be prudent in the next edition to avoid the possible misapprehension altogether. Similarly students should not be encouraged on p. 225 to fall into the very common error of referring to "the felony of larceny under section 1" of the Act (which creates no offence). Students may not find it easy to be told that "trespass or no trespass is an incidental and not an essential matter in the criminal law of larceny" (p. 236), and, on the other hand, that there can be no larceny without trespass (*ibid.*) and that at common law it still remains necessary that the "owner" has or had such actual possession as would have entitled him to sue for the writ of trespass (p. 231). Owing to the curious heading of paragraph 262, the distinction between things which are not capable of ownership and things which are so capable but which do not have a present owner is likely to be obliterated in the student mind: as the headings and lay-out now run the proposition presented is "The thing must have an owner, *i.e.*, it must be subject to human ownership," which at best is ambiguous and at worst incorrect. The exposition of *Rose* v. *Matt* is shorter than that of some other recent cases and more could be said of it. In fact it has been suggested that it indicates that the word "fraudulently" in the definition of larceny has a meaning—contrary to the view expressed on p. 241. It is good to read Mr. Turner's unsparing attacks on some of the other recent decisions on the law of larceny. On larceny from the person a word might be useful to emphasise the difference between ordinary asportation and that sufficient to satisfy the words "from the person." In Robbery, the statutory provision relating to violence *after* the robbery merits elevation from a footnote to the text. In the same context (on p. 253), the modification of Kenny's footnote which told us that robbery was "six times rarer proportionally than 50 years ago" makes the present note "proportionally rarer than years ago" read curiously vague. (In fact, several of the earlier interesting statistical footnotes have not been brought up to date: several of these data notes have been left as they stood in the 1930's. They should either be omitted or be modernised.) On blackmail, Mr. Winder's article on the historical aspect is useful in explaining much of the subject and certainly merits a footnote reference. (Mr. Denyer's pardon will become a fit subject for a footnote.) On Embezzlement, it is arguable that a little more is desirable on the *Cullum* point on the lines of Blackburn's judgment, but it may be better to leave it, as Mr. Turner does, by simple emphasis that the property must be taken by the accused *in his capacity as a servant.*[1] Although the matter is implied, it perhaps would be wise to emphasise the *mens rea* in embezzlement a little more, on the same lines as in the Fraudulent Conversion chapter. On Fraudulent Conversion, Mr. Turner is very insistent that it is limited to cases where the accused acquires *ownership*: his argument is very persuasive, but here and elsewhere he seems more optimistic than your reviewer in his hopes that the courts will follow these logical views of the exclusive scopes of offences when they are tempted to do otherwise. Would *Bottomley* be useful in driving home the rule that the person delivering the property to the accused may be the person for whom it is entrusted? (On the fiduciary element in this offence, students are bound to ask whether *Cullum* could have been successfully charged with fraudulent conversion!) On False Pretences, is it likely today that the courts would exclude from the scope of

the offence things which are now statutorily larcenable but were not larcenable at common law—*e.g.*, dogs? In para. 842, on the topic of the right obtained in False Pretences, Mr. Turner mentions the difficulties which have arisen on the "fundamental mistake" theory but has omitted Kenny's paragraph on similar difficulties concerning transfer by a person of limited authority: some explanation would be helpful at this point. Students are likely to feel some difficulty about reconciling the last words of doubt on the decision in *Boulton* and the immediately following paragraph on cheques (p. 280). (Note 6 on the same page is a trifle dark and will probably raise student inquiries.) On fact and opinion in the offence of False Pretences, the argument of Graves (of the Consolidation Acts) that *knowledge* excludes *opinion* may be worth mentioning (p. 283.) In the same offence, in view of the language used in *Chuoas* the difference between "*the* cause" and "*an effective* cause" is a topic meriting emphasis. (Mr. Turner in fact does adopt the right view.) In para. 850, the penultimate sentence is dark. Is the ambiguity due to the fact that the first "obtained" relates to the accused and the second to the victim? On the possession element in Receiving, *Payne* might well be added to *Pearson*, and the case of prior authorisation added in the text to that of subsequent ratification (p. 290). Your reviewer is not so happy about *Fuschillo* as Mr. Turner appears to be: even if, as has been recently suggested, the defendant's statements could reasonably be taken as a confession, the doubt still remains whether it was a confession that the goods were stolen and that he knew it. On p. 291 is the *Wessel* case rightly put under n. 8—or should it be under n. 4? The evidence rules in this offence, as suggested above, are so important that it is not satisfactory to postpone them to a later position in the book. (And in n. 7 on p. 291 the reference to "*statutory* evidence" seems to refer partly to the *common law* presumption on recent possession.) Trials for receiving go wrong so frequently that a full treatment of the subject in one piece seems desirable.

Even with the appendix on the meaning of "Credit," the treatment of the offence of Obtaining Credit by Fraud in thirteen lines in the main text seems very brief. The formulation of the *actus reus* in the Prevention of Fraud (Investments) Act, 1939, is so educative in its contrast with the meaning of "false pretences" that it is almost worth quoting in a student textbook. Mr. Turner's treatment of *Bassey* in the chapter on Forgery is very well worth special mention. In his argument in favour of regarding the misdemeanour under the Larceny Act, 1916, s. 32, and the felony under the Forgery Act, 1913, s. 7, as exclusive, Mr. Turner says that "it is hardly to be supposed that the legislature intended to create alternative offences *for exactly the same conduct*"; his argument for the exclusion of fraudulent bailees and servants from the scope of the fraudulent conversion provision of the Larceny Act was based on the view that "it would not be reasonable to suppose that *in the same Act* the legislature would offer alternative grades of crime (carrying different maxima of punishment) for one and the same deed."

In the chapter on Treason the decision in *Joyce* appears to escape lightly, but in fact there seems to a mighty pass made at it in an earlier footnote on p. 817! Under misprision of felony (p. 828, n. 6), is the date well chosen in the statement that "for many years *before 1948* prosecutions for it had been unknown"? Surely there were earlier instances in the preceding eighteen years or so. Mr. Turner deals very faithfully with *Manley* and the misdemeanour of Public Mischief, but the principle of *nulla poena* is such a fundamental one that it might be desirable to say even more on the subject. On motoring offences, the *Whittall* v. *Kirby* business is discreetly ensconced in a footnote. In the Conspiracy chapter the paragraph on p. 840 based on *Cooper and Compton* (1947) is likely to confound students. It is doubtful whether the case deserves a paragraph to itself. If the jury had refused to believe the evidence then it can hardly be said that in law it showed that the prisoners had completed their agreed purpose.

In the Evidence section, if the Evidence Act of 1938 requires two paragraphs in a textbook on the criminal law, it would be prudent to strengthen the warning that the provisions quoted apply only in the civil law. On Procedure, the descriptions of some of the courts (and particularly of the Central Criminal Court and Juvenile Courts) is brief; the note on p. 454 about the legal qualification of chairman of County Quarter Sessions is correct, but hardly adequate to describe the situation today; the statement on p. 479 that "all the proceedings in the magistrates' court must be strictly regular" is very abrupt without some explanation; an expansion of the note on *Wilmot* on p. 491 would be helpful as the reconciliation of the rules given in the text will probably puzzle the student somewhat; on the office and functions of the Director of Public Prosecutions, the present Director has spoken (p. 495); on p. 520, note 8, which says that the C.C.A. will quash convictions if the verdicts be unreasonable, the addition, "cases merely weak are not retried," reads very ambiguously; without some description of them, students may not understand the references to attendance centres.

The work is remarkably clear of slips but a few new ones have crept in and some old ones have not been corrected. *Stone* is wrongly dated in the index and on p. 180; on p. 149 a compound sentence has been broken by a full-stop; the Police Pensions Act, 1948, seems to have been overlooked (p. 295); the Judges' Rules were laid down in 1912 (p. 480); costs in civil proceedings against the Crown can now be supported by reference to the Crown Proceedings Act, 1947 (p. 515). Additionally, the form of citation of cases is not uniform throughout the book: a substantial number are not quoted by name but merely by reference to the reports and some of these place-references are in the text and some in the footnotes without apparent reason for the distinction. Similarly when the cases are named some find themselves in the text and not in the footnotes presumably because they happened to be placed there in some previous edition. But these are minor blemishes; the marvel is that such an onerous task of re-editing has been done with such care. The printing also is good. (Figures have disappeared in footnotes on pp. 412 and 492).

The right and deserved conclusion to any review of this work is an expression of profound gratitude to Mr. Turner for the discharge of a very difficult, if pious, task with such exemplary ability and judgment. Generations of students and teachers will be the beneficiaries of his labours.

D. R. S. D.

A Textbook of Jurisprudence. Second Edition. By G. W. Paton. [Geoffrey Cumberlege, Oxford University Press. 1951. xiii and 527 pp. 30s.]

The first edition of Paton's *Textbook of Jurisprudence* was reviewed in this Journal by Professor R. H. Graveson (10 M.L.R. at p. 80), who, with his usual sound judgment, observed that this book would become for many students *the* textbook of Jurisprudence. So it has proved. The second edition is, however, even better than the first, and the learned author has turned helpful criticism to good advantage. New sections have been added inter alia on *Bentham*, *Comparative Law*, *Post-Classical Law*, *Custom*, and *Statute Law*. Book V in the first edition (*Analysis of Law on the Basis of Interests*), has been re-written and transferred to Book II, which is concerned with the purpose of law. This was a wise and successful decision, and rearrangement of the work into its present form of six books has increased its cohesion and lucidity. The book contains illustrations from and references to French, German, Chinese, American and Scottish Law inter alia, and this greatly assists the reader to evaluate English solutions to general legal

problems. Paton's interest in Comparative Law and his Antipodean detachment have enabled him to present English Jurisprudence in perspective to an unusual degree.

In discussing the development of law by fictions, the author considers the limits of the Scottish doctrine of fictitious death which enables the successful pursuer in a divorce action to obtain legal rights out of the divorced spouse's estate. The time has come in Scotland for making provision for pursuers by an arrangement more suitable to an age when few people own much capital but many have substantial salaries or wages. By the time the third edition of "Paton" appears, one may anticipate that the fiction should no longer operate.

Since the learned author has not infrequently referred to Scottish cases such as *Selsdon* v. *Selsdon* 1934 S.C. (H.L.) 24 (in the example just quoted), *Donoghue* v. *Stevenson* 1932 S.C. (H.L.) 31, and *McMullen* v. *Lochgelly Iron & Coal Company* 1938 S.C. (H.L.) 64, it may be legitimate to suggest that in future editions the official Scottish references should be supplied. Professor Paton has given only the Times Law Report reference for *Selsdon*, and only the Appeal Cases reference for the other two cases. Accordingly, the reader might easily fail to realise that *Donoghue* and *McMullen* were in fact Scottish cases decided on relevancy (*anglice demurrer*). The custom adopted by learned writers on English Common Law whereby they refer to Scottish cases in the House of Lords by English citations sometimes leads them and their readers to doubtful conclusions. Despite the concession by counsel in *Donoghue* and dicta from their Lordships in both *McMullen* and *Donoghue*, the reviewer has still to be convinced that the Scottish law of Quasi-Delict is on all fours with the English tort of Negligence. More surprising, however, is Professor Paton's choice of *Donoghue* v. *Stevenson* to illustrate the English doctrine of precedent. Strangely enough, Stone and other leading jurists have done the same. It has yet to be established that a decision by the House of Lords in a Scottish appeal is strictly binding on an English court. (On this, see Glanville Williams 6 M.L.R. 80). *Non constat* moreover, that the doctrines of judicial precedent are the same in Scottish and English law. Indeed, the reviewer is strongly of opinion that they are not. Though the point is probably not now arguable in practice, it may be observed that the *London Street Tramways Case* doctrine need not necessarily apply to Scottish appeals. Lord Eldon alone seems to have directed his mind to the question whether the House of Lords is free to follow a different practice in Scottish appeals than that which it follows in English appeals. Moreover, the Court of Session is not completely helpless in the grasp of precedent (p. 165) unless the precedent is that of the House of Lords in a civil action. A special session of the court may be convened to review conflicting statements of a legal principle formulated in previous decisions although there is clear opportunity to distinguish on the facts. Further, there have been indications that a doctrine of desuetude is recognised in Scottish case law (see *Beith's Trustees*, 1950 S.C. 66).

A further point on precedent may be made. The learned author comments (p. 159) that "In England the courts are imperatively bound by decisions of higher courts in the same hierarchy." There is scope for fuller consideration of the variation of doctrines of precedent in the various hierarchies of courts within the same system. Recently, though precedent in English civil courts has become more rigid, a more liberal approach has been adopted by a full Court of Criminal Appeal in England—*R.* v. *Taylor* (1950) 2 K.B. 368. It is not, however, in every case that the consequences of a conviction in criminal proceedings will be more disastrous than those of losing a civil action, and the Lord Chief Justice's argument that greater flexibility is expedient *in favorem libertatis* may not necessarily be conclusive of the whole matter. At p. 166, the learned author suggests that there are some branches of the law in England which, because of rapid development, cannot pay

too much attention to old precedents. This view was certainly taken by Denning J. (as he then was) as applicable to pensions appeals—*Minister of Pensions* v. *Higham* (1948) 2 K.B. 153.

At p. 208 Professor Paton refers to the debt which the French Code owed to the jurists Domat and Pothier in fusing the Roman rules of the South and the Germanic customs of the North. Then considering the English system he asks "Would the doctrine of binding precedent have become established had the textbook enjoyed greater prestige?". An enquiry into Roman-Dutch law and Scots law might assist in solving this problem, since the authority of the Institutional Writers is an outstanding feature of these systems. The difficulty, of course, is that the institute has to be supplemented by case law, in time gets out of date, and thus a new institute has been required from time to time to digest the developments effected by case law. Lee in the present century and Kaimes in the eighteenth century have both referred to the difficulties involved in referring to authoritative writings written for a different age, but undoubtedly in those countries which classify institutional writings as a source of law, the basis of principle which they supply has mitigated the rigidity of case law. However, the natural consummation of these authoritative treatises in the modern world is presumably, as in France, the eventual promulgation of a Code.

At p. 286 Paton observes that "No injustice is done in imposing a light fine even on a person who is morally innocent." This, it is submitted, should be qualified. In those systems which have a special designation for infringements of the law involving no moral turpitude, the learned author's statement may be true enough. Where, however, the same *nomen juris* "misdemeanour" or "offence" covers both acts of turpitude and acts morally innocent, respect for law is probably sapped by the use of criminal procedure to regulate social conduct. A clear frontier between *mala in se* and *mala quia prohibita* is not so easy to define in practice. The enforcement of price controls is not purely a modern problem, as witness the Code of Zeno and the Lex Julia de Annona. There may or may not be moral turpitude on the part of a man who evades controls. On the question of insanity in Criminal Law (p. 296) it was rather surprising to note that Professor Paton still envisages a possible broadening of the *McNaghten* Rules through the doctrine of irresistible impulse. While this doctrine might have assisted progressive development in the past, is it not now out of favour even with the medical experts? On the associated topic of the fitness of juries to determine questions of insanity, the author's remarks are much in point. Clearly, if insanity is to be left as a jury question, the law and medical evidence must be presented in a way which a jury can understand. In any event they will ignore technicality.

There are a few small points which might be given attention in a subsequent edition. There is an obvious slip in setting up the type of the third and fourth paragraphs on p. 86, and on p. 361 in the new section on Sale and Hire Purchase there is a confusion between "buyer" and "seller" in the third paragraph. In discussing the doctrine of desuetude (p. 146) a more confident statement of the law would be justified than that ventured in the final sentence of p. 89. The references to Daube's *Biblical Law* (pp. 37 and 41) might justify an addition to the references on p. 50. In his Preface to the second edition, the learned author observes that Judge Frank has convinced him that he had not been altogether fair to the realists in the earlier version. This olive branch is somewhat withered by the retention of the rather sarcastic footnote 50 on p. 19.

Paton's *Textbook on Jurisprudence* has already proved itself. It remains only to say that the second edition will prove even more valuable than the original, and that its popularity will not be confined to the countries of the English common law. Since many able reviews will be written by those who expound the law of England, the reviewer makes no apology for assessing the

book somewhat from the standpoint of one who "sits on the fence" between the common and the civil law. In chapter 10, the learned author has discussed the influence which a textbook may have on the development of the law. His own work might well be quoted as an example.

T. B. SMITH.

THE ACTION ON THE CASE: An Historical Survey . . . up to the Year 1700. By A. K. KIRALFY. [London: Sweet & Maxwell. 1951. xxxii and 248 pp. 50s.]

IN reviewing a work of this sort, it is especially necessary to insist at the outset that it has considerable merits, that the author has laboured long upon very difficult material, most of it in manuscript, that he has devoted much thought to what he has found, and that he has made suggestions some of which deserve serious consideration. In short, he has deserved well of the learned world, and anyone who writes about case in the future will have to consult this book.

Such a reader will have a heavy task before him, unfortunately. The book contains no footnotes, or rather, the footnotes are printed continuously with the text and merely enclosed in brackets. No more effective way could be devised to render a book unreadable than to secrete the author's thought in the interstices of a crazy-paving of citations. The citations are fortunately in the conventional form to which lawyers are accustomed; but historians too are sticklers for propriety, and will find it hard to forgive Dr. Kiralfy for ignoring it so pointedly. Scores of times he uses the Rolls Series of Year Books and attributes them to a mythical "Rolls Society"; he has endowed the Selden Society with a non-existent "Select Pleas Series." He uses only one passage from Bracton, but four times out of five the reference is wrong. A most valuable appendix of hitherto unprinted cases, which will be consulted for many years to come, bursts into large capitals every few lines so that he who runs may read (although he neglects the rest at his peril). Misreadings are happily rare (the only one obscuring the sense is on p. 217, line 11, from the foot where "conficti" must be corrected to "consuti," and in the next line read "venerabilibus"). There is a most impressive list of plea rolls consulted, but it does not say where in the book use has been made of them; the law terms are put out of order since the author thinks wrong dates more convenient. To speak of "Titus MSS" and to describe a Royal MS as "other" suggests a very slight acquaintance with the British Museum. Although the author has amassed so much evidence against himself, it is clear that he really has seen and perused these books and manuscripts, even if he refuses to handle them as a historian would.

It goes deeper than that, however, for these vagaries are symptoms of a refusal to think historically. Thus on p. 19 an argument is based on the position of commas in various editions of Bracton and Fleta without realising that commas are the work of modern editors and do not appear in the manuscripts. Further, Dr. Kiralfy uses only half of Bracton's short sentence on which to base his submission (p. 20) "that the action on the case is to be traced to the *breve formatum super certis casibus* and not to the *breve magistrale*." The second half makes all this untenable, for Bracton says that *brevia formata* can in no circumstances be changed without the consent of all the realm. How then can such writs be the parent of the Protean case? And (if it is to Bracton that we must look) how can we exclude the *brevia magistralia* which Bracton says, "are often varied in accordance with varied cases, facts and complaints?"

A curious example showing that the author is not looking for historical facts, but for legal propositions, appears on p. 22. From Bracton he has been led to the conclusion that "the writ on the case antedates the statute of 1285." This is of vital importance, if true, and it *is* true, because

expectation, and they will not be disappointed. Written by a member of the trustee department of one of the banks as a result of a grant from the Houblon-Norman Fund, it is an unusual work of great interest dealing with one of the most fascinating of recent developments in the relationship between trust and corporation. In the past the trust concept has been invoked both in the development of the law of incorporated companies (notably in connection with the position of directors) and to enable a joint stock company to function with most of the advantages of corporate personality without a formal grant of incorporation which, until 1844, was a rare and expensive luxury. More recently the corporation has returned the compliment by facilitating the working of the trust by providing a corporate trustee with perpetual succession, financial stability and professional expertise.

Mr. Marsh's first five chapters are largely devoted to a treatment of this historical development. These are exceptionally well done. The author has not only made full use of recent published material, but has also undertaken considerable original research into the early efforts, for example by the atrophying South Sea Company, to introduce and popularise the corporate trustee, efforts which eventually led to the establishment of the Public Trustee and the trustee departments of the banks and insurance companies. The particular virtue of his treatment is that he is not content merely to describe what happened, but seeks throughout to explain why and to point the lessons. For example, he rightly emphasises that the law's refusal, until 1889, to permit joint tenancies between individuals and corporations, and, until 1920, to allow the direct grant of probate or letters of administration to corporations, resulted in numerous anomalies and wasteful efforts to surmount them, which illustrate "the friction that may arise when legal theories lose touch with changing social facts" (p. 99). On one point it is possible to quarrel with Mr. Marsh. He says (at p. 12) that there seems no escape from regarding the directors of a company in the same light as agents of human individuals; if, however, he looks at *Lennards Carrying Co.* v. *Asiatic Petroleum* [1915] A.C. 705, and the cases on the criminal liability of companies, he will find that the courts have, in fact, found a means of escape.

In Chapter VI Mr. Marsh deals very fairly with the hostility of the legal profession towards trust corporations and has no difficulty in showing that it was largely unfounded and is beginning to die. In these circumstances it is particularly unfortunate that he should, elsewhere, have gone out of his way to exacerbate the legal profession by unjustified digs at their competence. Mr. Marsh is clearly an enthusiast, and he can be forgiven for praising the work of the bank's trustee departments even though the reader may feel that his praise is sometimes exaggerated and would be more appropriate to a newspaper advertisement than a scholarly work (see p. 204). But it is inexcusable to revive old quarrels that are better forgotten by constantly contrasting the alleged skill and thoroughness of the banks with the alleged incompetence and apathy of solicitors. Nobody contends that every solicitor is a good one, but it is grossly unfair to suggest that the average solicitor is unaware of the advisability, where the beneficiaries are resident abroad, of investing in stocks on which the interest is paid without deduction of British income tax and which are exempt from British death duties (pp. 228–9), that he cannot draft a will without obscurities (pp. 254–5, and 265), that he does not appreciate the need to exclude technical rules regarding apportionment between income and capital (pp. 255–6), or that he needs any help in drafting a wide investment clause (p. 236). Mr. Marsh may well have had unhappy experiences with solicitors—but so have solicitors with trustee departments. For example, the reviewer well remembers one case in which the bank, failing to understand the, admittedly complicated, rules relating to abatement of legacies and annuities when the estate is insufficient to pay both in full, paid an annuitant less than half the sum to which he was legally entitled, and made a second mistake in calculation even after the matter had been drawn to their

attention and they had taken counsel's opinion. It is incidents like this which make one doubt the truth of Mr. Marsh's proud boast (see p. 190 and elsewhere) that "no trust beneficiary has ever lost a penny through . . . mistakes of corporate trustees." It is true that the beneficiary did not, in the end, lose a penny in this particular case, but the mistake would never have been discovered if a friend had not persuaded the reluctant annuitant to visit a solicitor for the first time in his life.

But mutual recriminations are best avoided. As Mr. Marsh says, "a way of live and let live has been hammered out in the last forty years." It is a major flaw in this otherwise excellent book that it seems determined to disturb the *modus vivendi*.

Chapter VII deals with charges and profits and contains an interesting and critical discussion of the methods of charging and a plea for a more scientific method of assessment. In a comparison (at pp. 148 *et seq.*) of the charges of the Public Trustee and the trustee companies, Mr. Marsh has no difficulty in proving that the companies are nearly always considerably cheaper. He seems to be on less firm ground, however, when he seeks to prove that they are also cheaper than a private administration. He takes certain selected cases and shows that in these the total costs would have been greater had there been private administrators who left everything to the solicitors. This, however, is only a valid argument on the assumption that the corporate trustee does all it can and only leaves the purely legal work to the solicitor. Mr. Marsh admits that practice varies widely in this respect, and that "in some instances the corporate executor feels it is the wiser course to leave things to the solicitor as though it were a private individual executor" (p. 258). When this is done it can hardly be doubted that the costs of administration by a corporation are considerably greater, even if it makes a reduction of its normal fee, as it sometimes does. Here again, Mr. Marsh weakens his case by protesting too much.

Chapter VIII contains a valuable description of Office Organisation and Staff. Mr. Marsh is probably right in attributing the vast increase in the trust companies' businesses to a policy of decentralisation introduced during the last 15 years. Whether he is right in criticising the Public Trustee for not following suit is more questionable. Doubtless decentralisation has enabled more business to be attracted and is responsible for the fact that the banks have outstripped the Public Trustee, but it does not necessarily make for increased efficiency which the Public Trustee has rightly always made his primary aim. This chapter also contains an interesting criticism (almost a *cri de coeur*) of the parsimonious wages policy adopted by the banks towards their trust officers.

The only other chapter (X) to which special attention need be drawn is that dealing with Investment Policy. Here, as elsewhere, Mr. Marsh draws largely on comparative material and makes a strong case for "common-fund" investment of trust funds of small estates such as is permissible in New Zealand and the U.S.A.

The whole book, however, can be read with interest and instruction as a very complete account of the development and practical working of a trustee department. The emphasis is on the work of the banks and too little is said about trustees for debenture-holders—a branch of trustee work of which the banks have tended to fight shy since the *Dorman Long Case* [1934] 1 Ch. 635, revealed the dangers of being both banker and trustee. On the other hand there is a good, if brief, account of Unit Trusts (see especially pp. 269 *et seq.*)—fascinating institutions which have received too little attention in legal literature.

The publishers, newcomers in this particular field, are to be congratulated on an excellent piece of book production at (*mirabile dictu*) a very reasonable price.

L. C. B. G.

THE PRINCIPLES OF INCOME TAXATION. By J. P. HANNAN and A. FARNSWORTH, LL.D., PH.D. [London : Stevens & Sons, Ltd. 1952. lvi and 582 pp. £3 3s.]

THIS book is an adaptation for English practitioners of a work originally published in Australia by Dr. Hannan. Its aim is to deduce from the decisions of the courts those basic principles which determine the nature of taxable income and the cost of earning it. The adaptation has been carried out by Dr. Farnsworth with a care and learning which cannot be too highly praised, and it now contains a digest of nearly a thousand tax cases decided both in Britain and in the Commonwealth.

Its main fault, it is submitted, is inherent in the basic conception of its original author that an adequate practical guide can be furnished solely by case law and by ignoring statutes. This, surely, is an example of the heresy which by now we should have outgrown, that only case law can be dignified by the word "principles" and that statutes must be regarded as an unfortunate rash which it is politer and more expedient to ignore. It is, of course, true that the Income Tax Acts have never defined "income" and that it would be perfectly possible to write a thesis on the Nature of Income without reference to any statute. But this book is not a work of abstract jurisprudence but a severely practical work restricted to tax questions which it investigates in some detail, and disregard of the relevant statutory provisions sometimes gives the impression that Hamlet is being played without the Prince of Denmark.

Dr. Farnsworth has obviously been alive to the likelihood of this criticism and has done his best to meet it in advance. References to the Income Tax Act have been added "where they seem to exemplify" common law principles, and where they contradict these principles a warning to this effect has been inserted. But even Dr. Farnsworth seems unwilling to recognise the possibility that the legislature may enunciate a principle as well as a judge, although a reader of many of his chapters will be left with the impression that case-law has often been conspicuously unsuccessful in producing any coherent principle at all. This over-conservative approach appears to the reviewer to have seriously diminished the practical value of the book, great though its value undoubtedly is.

In a work of this size on a topic of such complexity every reader will find something with which to argue. If the present reviewer may ride his own particular hobby horse, he would single out for comment the chapter (6) on Dividends and Bonus Shares. In dealing with the anomalous rule that a recipient of a dividend paid by a British company is only assessable to surtax thereon if the dividend is paid out of profits chargeable to tax in the hands of the company, the learned authors explain it as a necessary consequence of the operation of "taxation at source." It is respectfully submitted that this is no explanation at all. Even if the company cannot deduct tax unless the dividend is paid out of a fund chargeable to tax in its hands, there is no reason why it should follow that the dividend cannot be regarded as taxable in the hands of the recipient, as it would be if the company was not British: *I. R.* v. *Trustees of Reid* [1949] A.C. 361. No clear reasons for the contrary rule can be deduced from *Gimson* v. *I. R.* [1930] 2 K.B. 246, in which it was laid down by Rowlatt J., or from *Newmann* v. *I. R.* [1934] A.C. 215, in which *Gimson* was approved by the H. L. In fact, the rule seems to be the one remaining relic of the now exploded idea that a company pays tax as an agent for its members so that the test of what is taxable income must be the same in both cases. And incidentally it is surely misleading to cite *Dixon* v *I. R.* (1937)—not (1931) as quoted at p. 72—21 Tax Cas. 365 under the heading "Distribution of Capital Assets"; the whole basis of the decision was that the fund distributed was income in the

hands of the company, and only on this basis is it "clearly in line with principles (sic) already stated."

This same chapter also furnishes an example of the unsatisfactory result of the somewhat perfunctory treatment of statute law to which reference has already been made. At p. 78, *Drown* v. *British Gaumont Picture Corpn.* is quoted as authority for the proposition that Share Premiums may be distributed by way of dividend, without reference to the fact that this has been overruled by the Companies Act, 1948, s. 56. On the following page this section is quoted, but the reader is left to deduce that *Drown's Case* is no longer law.

These criticisms must not be taken to suggest that this book will not be of immense value to tax advisers. On the contrary, it will be a most useful work of reference and many of the chapters could scarcely be bettered. Chapters 18–20, dealing with the tax problems arising out of various types of compensation payments, are likely to prove especially valuable.

L. C. B. G.

CANADIAN CONSTITUTIONAL LAW. By BORA LASKIN, Professor of Law in the University of Toronto. [Toronto: The Carswell Co., Ltd. 1951. xvii and 676 pp.]

PROFESSOR Laskin's book is not a comprehensive treatise on the constitutional law of Canada; it is a book of cases and materials on the distribution of legislative powers between the Parliament of Canada and the provincial legislatures. But when he describes it, in his Preface, as a "collection of cases interspersed with text and notes" he is too modest. It incorporates all the features that are associated with the best American casebooks: judicious selection and arrangement of basic materials, ample references to periodical literature, and, above all, suggestive and illuminating editorial comment. It is, in fact, a work of high quality and a notable contribution to legal literature. The Canadian students for whose benefit the volume was compiled are most fortunate. One who has prepared a course on Canadian constitutional law for post-graduate students in the University of London cannot but lament the fact that it could not have been published two years earlier.

It may seem captious to express regret that the scope of this excellent—and substantial—volume was not wider. But the fact is that this is the first general work to have been published on Canadian constitutional law for over 80 years. There have been admirable books by Kennedy, Dawson and Clokie on the constitutional history and system of government of Canada, but no work that has been devoted primarily to an exposition of its constitutional law. Yet every volume of the *Canadian Bar Review* and the *University of Toronto Law Journal* contains articles and notes on constitutional law; and in 1939 and 1940 there were published the O'Connor Report to the Senate on the British North America Act, and the massive Report of the Royal Commission on Dominion-Provincial Relations. Perhaps the main reason for the absence of treatises and textbooks is to be found in the character of the O'Connor Report and the great majority of articles by academic lawyers, which have been highly critical of the manner in which the Constitution has been interpreted by the courts. The complaint that the principles of judicial interpretation have generally failed to give effect either to the letter or to the spirit of the British North America Acts seems to be well-founded. It is plain that the 1867 Act was intended to form the framework of a centralised federal system. The Parliament of Canada was given a general power to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects expressly assigned to the Provinces. As illustrations of this general power conferred upon the Canadian Parliament there were enumerated 29 heads of legislative power.

But these enumerations were not intended to be exhaustive, and the residuum of legislative power was to belong to the Parliament of Canada, for the Provinces were to be strictly confined to their own enumerated heads of legislative power. The primacy of the Centre is further emphasised in that the Governor-General (on the advice of his Ministers) has power to appoint and dismiss the Lieutenant-Governors of Provinces and to disallow provincial legislation. Nevertheless, the Judicial Committee of the Privy Council showed a persistent solicitude for provincial "autonomy," and in order to safeguard the Provinces from "encroachments" by the Dominion Parliament it evolved principles of interpretation that enhanced the legislative competence of the Provinces to the detriment of the Centre. The general power to legislate for the peace, order and good government of Canada was first "strictly confined to such matters as are unquestionably of Canadian interest and importance"; later Lord Haldane attempted to restrict it "to cases arising out of some extraordinary peril to the life of Canada." It was reduced to the status of a supplementary power, to be relied on in support of Dominion legislation in times of emergency; otherwise the legislative powers of the Dominion were limited almost exclusively to the enumerated heads of power, which had been intended to be merely illustrative of its "general" power. Moreover, the enumerated heads of power were themselves restrictively construed. Thus, the ambit of the Dominion trade and commerce power was held to be a narrow one; on the other hand, the provincial property and civil rights power came to embrace a vast range of subject-matters of legislation. Between the wars, Acts of the Dominion Parliament providing for conciliation in labour disputes, the regulation of insurance, marketing schemes, investigation of combines, the establishment of minimum wages and maximum hours of labour and a number of other matters were held to be invalid on the ground that their subject-matter fell exclusively within provincial competence as legislation in relation to property and civil rights in the Provinces.

In the result, the capacity of the Parliament and Government of Canada to regulate economic activity, to make provision for social welfare, and even to secure the implementation of international obligations, was seriously impaired. Surveying the work of the Judicial Committee of the Privy Council, Mr. Justice MacDonald, the distinguished Canadian constitutional lawyer, recently wrote that "our Constitution, as it now exists in a text encrusted with decisions, is not what we sought or what the Imperial Parliament provided for us" ((1951) 29 Can. Bar Rev. at 1061). While purporting to interpret the Constitution like a statute, the Judicial Committee contrived to cast a protective mantle over the Provinces. However, two observations are permissible. If the Judicial Committee assumed the role of judicial statesmen, they did at least mould a Constitution that meets with the approval of a great number of Canadians; the most important Provinces will not consider relinquishing to the Centre any significant segment of the sphere of legislative competence that has been bestowed on them by the grace of the courts. Indeed, provincial particularism has hitherto prevented any agreement within Canada upon the adoption of a procedure whereby the entire Constitution could be amended without reference to the United Kingdom Parliament. Secondly, it is possible that the decisions of the Judicial Committee in the *Canada Temperance Federation Case* [1946] A.C. 193, and the Canadian Supreme Court in *Johannesson* v. *West St. Paul* [1952] S.C.R. 292, may presage a revival of the "general" power of the Canadian Parliament and a movement back towards the intentions of the framers of the British North America Acts.

It is to be hoped that Professor Laskin's book will be made available by the leading English law libraries. Lawyers who dip into it will find a fascinating record of the response of the Judiciary to a challenge that is not offered by any aspect of English law. Federalism is legalism; and where

constitutional development is seen to proceed mainly by judicial review of legislation there is no place for pretences that the judges do nothing but declare the law. That the experience of Canada in the matter of constitutional interpretation should not have been a very happy one is hardly surprising in view of the unfamiliarity of English judges with the duty that they were required to discharge. If one may say so without disrespect, two of the wisest decisions ever rendered by the Judicial Committee were those in which it upheld the validity of Canadian legislation abolishing the right of appeal.

S. A. de Smith.

The Constitutional Law of Great Britain and the Commonwealth. By O. Hood Phillips, M.A., B.C.L., Dean of the Faculty of Law and Barber Professor of Jurisprudence in the University of Birmingham, assisted by G. Ellenbogen, M.A., of Gray's Inn and the Northern Circuit, Barrister-at-Law. [London: Sweet & Maxwell. 1952. xliv and 826 pp. 42s. net.]

Leading Cases in Constitutional Law. By O. Hood Phillips, M.A., B.C.L., Dean of the Faculty of Law and Barber Professor of Jurisprudence in the University of Birmingham. [London: Sweet & Maxwell. 1952. xxi and 469 pp. 35s. net.]

Shortly after the War, Professor Hood Phillips placed students of constitutional law, and their teachers, heavily in his debt. His admirable new editions of Chalmers and Asquith's textbook and Thomas and Bellot's casebook resuscitated useful works that were in danger of passing into oblivion. A comparison of the present edition of the textbook with its contents before the War shows that it has been almost entirely re-written. Very properly, both textbook and casebook now appear under Professor Hood Phillips' name.

The main characteristics of the textbook are its wealth of detail, full documentation (particularly in the matter of references to writings of academic lawyers), lucidity and accuracy. It is indeed a quite extraordinarily accurate piece of work. The field of constitutional law is so wide that a few lapses are pardonable, but Professor Hood Phillips and his collaborator have no need to crave the reader's indulgence. The quality of accuracy is especially noteworthy in the section on the Commonwealth. This was probably the most exacting part of the book to write, and it includes such notoriously difficult topics as the judicial interpretation of the British North America Acts; but if there are any mistakes in it they have eluded the reviewer.

The glaring weakness of the previous edition was the sketchy account of administrative law. This part of the work has been greatly expanded, and the new material leaves little to be desired, though the chapter on public corporations is rather thin and there is no substantial ground for saying (p. 348) that recent cases have shown a tendency to narrow the scope of certiorari. An unfortunate result of the necessary inclusion of new material has been an increase in the size of the book to over 800 pages, in spite of the deletion of chapters on the history of the courts. It is not easy to see how the problem of size can be solved without impairing the value of the work, for one would wish to have still more space devoted to some of the more controversial issues, where the author is sometimes content to mention the views of others without expounding his own. Perhaps the answer may lie in rewriting sections in which an undue amount of space appears to have been devoted to accounts of individual cases: see, *e.g.*, pp. 357–60, 551–5, 645–7.

Hood Phillips can be unreservedly recommended to students as a textbook, and to others as a valuable work of reference.

The casebook, which underwent drastic changes in its previous edition, has been improved by the introduction of some leading cases on Commonwealth relations and the addition of six cases on administrative law. Room was found for the newcomers by the ejection of ten less important cases. The editorial notes in this edition are brief; in a number of instances there is a bare reference to the relevant pages of the textbook. This may diminish the value of the casebook for those students who do not buy the textbook as well; but to protest on their behalf would be both churlish and naïve.

S. A. DE SMITH.

CASES ON ADMINISTRATIVE LAW. By K. C. DAVIS. [Boston: Little, Brown & Co. XXV and 1081 pp. 1951. $8.50.]

THIS volume is another of those massive compilations which play so important a role in American law teaching. The author or editor has collected his materials from many sources including cases, articles, books, hearings and minutes of evidence. Notes and problems follow many of the excerpts. Professor Davis is well known to administrative lawyers in this country by his many learned articles. These formed the basis of a textbook which he has recently had published and the casebook is designed as a companion volume. This is not the usual practice in American law schools where textbooks do not hold that central place allotted to them in English law teaching. Professor Davis comments on this "parallel organisation of the two books." He writes: "It helps in designing the casebook exclusively for instruction of classes of law students, it relieves the casebook of such incidental functions as providing references for further study or research, and it takes care of corners that the casebook must leave unfilled. But the effects of the parallel text are by no means limited to those relatively superficial ones. The very heart of the educational process becomes involved. If the primary need of law students is not a mere knowledge of law but is ability to grapple with problems—and this book is constructed on that premise—then special precaution must be taken to prevent the text from destroying the process of problem solving. . . . Solutions the student assumes to be authoritative may easily become the enemy of sound education."

This is an interesting comment. Those of us who have never been to an American law school learn from those who have that one effect of the casebook method of teaching is to produce a student well able to reason for himself, not afraid to speak in the public lecture room, and ready to question the validity of authoritative pronouncements. Professor Davis is immediately fearful lest his textbook should impair these qualities. He insists on the need for "concentrating upon problems along the frontier of the subject where authoritative answers are not to be found." Clearly the grappling with such problems must follow the learning of many rules of law. All this takes time and the American short-cut is the casebook. The weakness of this method therefore seems to be that the student consults cases in the collected volumes of law reports or other materials in their own context far less frequently than the student in this country. The weakness of our system is that we do not make time (some would say, *have* time) to deal with the problems which lie behind the judicial answers in particular cases. This is not the place to elaborate a possible synthesis.

Finally, to emphasise again how far more advanced than our own is the American study of administrative law, here are the titles of the twenty chapters in this book: the administrative process; delegation, subdelegation and interpretation of powers; investigation; supervising, presenting, advising,

declaring and informally adjudicating; interpretative, legislative, and retroactive rules; rule-making procedure, requirement of opportunity to be heard; adjudication procedure; institutional decisions; bias; separation of functions; evidence; official notice; findings, reasons and stare decisis; res judicata; exhaustion of remedies, ripeness and primary jurisdiction; standing to enforce and challenge; forms of proceedings for review; tort liability of governmental units and of officers; non-reviewable action; scope of review.

J. A. G. GRIFFITH.

POWER POLITICS. A Study of International Society. By GEORG SCHWARZENBERGER. Second Edition. Published under the auspices of the London Institute of World Affairs. [London: Stevens & Sons. 1951. xxii and 816 pp. Index. Bibliography. £8 10s.]

STUDENTS of International Relations have cause to be grateful to Dr. Schwarzenberger for his decision to publish a second revised and expanded edition of Power Politics, first published in 1942. This edition again reflects his wide range of knowledge, his analytical faculties and his balanced judgment.

Dr. Schwarzenberger is foremost among those who regard International Relations not merely or primarily as a study of contemporary events or recent diplomatic history, or of international institutions or law, but of international society, its structure and dynamics, and of the members of that society and their relations to one another in all their manifold aspects. To him it is essentially a field for sociological analysis, to which the related disciplines of history, law, political science and economics should be harnessed. He is well equipped with the basic legal, political and sociological training to undertake such an enterprise. To teachers of international relations the most interesting and valuable portion of this book may well be the introductory chapter, in which he sets out his thesis of international relations as a branch of sociology applied to international society, boldly asserting its claim and suitability as a field for academic study. His insistence on the merits of international relations as a science with a unity imposed by its subject-matter rather than a mere "conglomeration of disjointed pieces of knowledge," or an annex of history or politics, is argued with cogent reasoning, which, at least, should cause those who regard this academic parvenu with suspicious apprehension, to approach the question anew with a more open mind. Nor does Dr. Schwarzenberger lightly ignore the difficulties or dangers inherent in the very complexity of the study. On the contrary he examines them thoroughly and carefully. He admits the existence of the twin perils of dilettantism and tendentiousness, but thinks that their obvious presence serve as "an ever present reminder of the need to be critical of one's own subconscious valuations" (p. 10).

The original impetus to the study of international relations was the emotional shock of the First World War, and the wave of idealism which rose up in its wake. The study of international relations tended to centre on the machinery of international cooperation and it was assumed that the creation of such machinery would succeed in banishing war. Study was concentrated not on international society as it was, but as it ought to be. The events of the thirties destroyed the optimistic assumptions upon which this approach was based, and a more realistic tone began to characterise the study. Dr. Schwarzenberger approaches the subject with the object of examining how States behave in their relations with one another. He applies to the wider field of international relations the inductive method which he has applied to the specialised study of international law.

Broadly, the book is divided into three parts. In the first, Elements of Power Politics, the evolution and structure of international society, and the

patterns of relations and the behaviour of its members are examined. Power in this context is defined as "the mean between influence and force, power distinguishes itself from influence by reliance on external pressure as a threat in the background, and from force by preference for achieving its ends without the actual use of physical pressure" (p. 14). Power politics is defined as "a system of international relations in which groups consider themselves to be ultimate ends" (p. 18). Dr. Schwarzenberger sees the basic trend of international society to be towards the reduction in the number of effective Great Powers, which has reached the contemporary stage of two opposing nuclei. One might perhaps question whether this trend is inevitably bound to continue. It is not outside the bounds of possibility that other centres of major power may gradually emerge. Too great a concentration on contemporary phenomena may conceivably cause us to be surprised by later developments. One immediately thinks of the long-term potentialities of China as a major force in world politics.

The second section is entitled Power Politics in Disguise, which the writer defines as a system of power politics in the cloak of a community (p. 18). Here he examines the emergence of international institutions, universal, regional and functional, and the degree to which, if any, such developments have modified the operation of a system of power politics. His verdict is in the negative. Power politics can only be superseded by a world community, neither the League of Nations nor the United Nations have or could create such a community. And with an almost brutal frankness he writes: "Thus it is complete illusion to imagine that world peace depends on the United Nations. The United Nations depends on peace between the world powers. The problem of how to break the vicious circle of power politics in disguise is still unsolved" (p. 724). Dr. Schwarzenberger is undoubtedly right in emphasising the point that institutions will not of themselves exorcise the operation of power politics but it might be relevant to suggest that the accumulated experience of international organisation may help to create certain patterns of behaviour and a climate of opinion which may make possible that transformation of an international society dominated by power politics into an international community.

In the third part, Dr. Schwarzenberger proceeds to an examination of future trends and to an analysis of the conditions and problems of international planning. He warns against the uncritical acceptance of the principle of gradualness. "If we develop the habits of friendly and peaceful international cooperation it is said, and slowly but surely accustom nations to such laudable practices, then, one day, we shall wake up in an international community" (p. 78). Dr. Schwarzenberger considers a number of possible patterns of planning for the future. Discussing the United Nations Reform Pattern, he brings out clearly the fundamental dilemma of establishing a world order in a system of power politics To be effective, such an order demands the subordination of the world powers to a universal law, but any attempt to coerce such powers would lead to war. None of the proposals to reform the United Nations is "capable of leading out of the impasse." "They either presume the present relative universality of the United Nations or they postulate by implication the reduction of the United Nations to the status of an international organisation of one of the two worlds" (p. 758). Turning to what he terms the Nuclear Pattern, he distinguishes between Regional and Functional Integration and Federal Integration. Of the first, it takes for granted the impracticability of establishing a world community in the foreseeable future, but it offers no alternative to world power politics, and, it may be added, is only too likely to accentuate international tension. As to the second form, the federal, Dr. Schwarzenberger postulates the minimum requirements of federation, a consideration of which might well be recommended to the supporters of World Government now. In his view the optimum area of federation is smaller than the non-Soviet half of the world,

but larger than the individual areas of the British Commonwealth, the Western Hemisphere or Western Europe. He sees a gleam of hope in the Atlantic Organisation, if it can develop from a primarily military alliance into a more political association based upón the principle of an open community, for otherwise it would degenerate into another of the antagonistic groupings of power politics in disguise.

While it would be possible to disagree with some of the arguments and conclusions expressed in this book, the incisiveness, range and balanced realism of his analysis makes an unique contribution to the study of international relations. Other writers have emphasised the dominant role of power in international society, but their definition of power has been too simple and crude, and they have tended to conclude that it is useless to discuss the emergence of a world community. Dr. Schwarzenberger does attempt to chart the unknown.

This volume will be of value to a general reader as an antidote to the still prevalent wishful thinking about international relations and to the prejudices which may be the more powerful because they are often unconscious. It might also serve as a useful textbook to students of international relations.

IEUAN G. JOHN.

RECENT TRENDS IN THE LAW OF THE UNITED NATIONS. A Supplement to "The Law of the United Nations." By HANS KELSEN. Published under the Auspices of the London Institute of World Affairs. [London: Stevens. 1951. 905–994 pp. Index. 10s. 6d. net.]

THE Commentary on the Charter of the United Nations presented to Parliament in 1945 by the British Foreign Secretary observed: "The successful working of the United Nations depends on the preservation of the unanimity of the Great Powers. . . . If this unanimity is seriously undermined no provision of the Charter is likely to be of much avail. In such a case the Members will resume their liberty of action" (Cmd. 6666, p. 17). Unanimity of the Great Powers becomes more and more remote as the years go by. Members have perhaps not yet altogether resumed liberty of action, but various attempts have been made to devise means either to supplement the collective security system of the United Nations or to work the whole machinery without its originally designed mainspring. The constitutionality of some of these devices, such as the North Atlantic Treaty Organisation for collective self-defence, the United Nations action in Korea, the extension of the appointment of the Secretary-General by the General Assembly without a recommendation from the Security Council, the Acheson Plan for collective measures to preserve peace, has been examined by Professor Kelsen in the recent Supplement to his penetrating *Law of the United Nations*, already noticed in this journal ((1951) M.L.R., pp. 367–9).

In the main work, even though, as was observed in the previous review, "one may disagree with the . . . static and limited role assigned to the jurist," the author, in his general commentary on the Charter, used with great success the method of presenting all the possible meanings and constructions that might be attributed to the terms and provisions of the text. However, the use of the same method in examining *ex post facto* the legality, in terms of the Charter, of a few specific incidents that have already taken place cannot help developing often an air of artificiality, especially when the author appeared in more than one instance evidently the last person to believe in some of the essayed constructions. The Supplement would have yielded added interest had the author enlarged on what he only touched upon in the Preface, namely, the problem of *de facto* revision of the Charter presented by these

devices. Nevertheless, its detailed analysis constitutes a valuable juridical study of an important chapter in the life of the United Nations.

On a point of detail, it may be mentioned that Professor Kelsen maintains that Article 51 of the Charter, in speaking of the "inherent" right of self-defence, "presupposes the natural-law doctrine. . . . For those who do not accept it Article 51 has, in spite of its wording, a constitutive character. It is this Article which establishes the right of self-defence" (p. 914. *Cf. Law of the United Nations*, p. 792). Judging by both the Chinese and the French texts, the Charter does seem to presuppose the natural-law doctrine. However, even for those who do not accept it, Article 51 may yet be regarded not as constitutive but merely declaratory—declaratory not of natural law but of customary international law. The right exists prior to, and independently of, Article 51 which confirms rather than establishes it. This difference in approach gives a slightly different turn to the interpretation of the provision, probably the one article in the Charter the most referred to in the Supplement.

B. CHEN.

CHARLES EVANS HUGHES AND THE SUPREME COURT. By SAMUEL HENDEL, Member of the New York Bar, Assistant Professor of Government at the College of the City of New York. [New York: King's Crown Press, Columbia University; London: Oxford University Press. 1951. xii and 387 pp. (with Table of Cases and Index). 30s.]

THIS book consists of an appreciation of the judicial contribution of Charles Evans Hughes as a member of the Supreme Court, first as Associate Justice, from 1910 to 1916, and then as Chief Justice, from 1930 to 1941. It is not the author's purpose to draw a full life portrait of his subject, although a sketch is given of Hughes' career prior to 1910, as lawyer, public investigator and Governor of New York State, and of his political and legal activities in the years between the time when he resigned from the Supreme Court in 1916 to become the Republican Candidate for the Presidency, and the time when he was reappointed to the Supreme Court by Hoover in 1931 (this time as Chief Justice). Mr. Hendel is primarily concerned with Hughes' contribution to the solution of the important constitutional issues of his day. Above all, the book is an endeavour to assess fairly the work of the man as Chief Justice, and the account of his career prior to his elevation to this high office is mainly directed to providing a proper background and perspective for this assessment.

Hughes was a striking figure in American public life for nearly half a century, and the Supreme Court over which he presided became the centre of controversy in 1935 and 1936, when no less than a dozen decisions were given which were unfavourable to President Roosevelt's New Deal legislation. The crucial role played by Hughes at this time of crisis, first in siding with the more conservative members of his court to invalidate several New Deal measures, and then transferring his allegiance to the liberal side to uphold other New Deal measures, shortly after Roosevelt had produced his scheme to reorganise the court, has been the source of great speculation and debate. What was the true explanation for the Chief Justice's apparent somersault? Did he really see the red light and steer his course accordingly, or were there convincing legal grounds for his differing opinions? Mr. Hendel's investigation throws some light on the matter, but he confesses that "few men have more successfully eluded simple and unequivocal characterisation" (Preface), and his approach, with its rather narrow self-imposed limitations, precludes him from giving us the whole picture. The book also loses clarity by not being entirely chronological in its account, the author having preferred to

group decisions according to subject-matter, no doubt correctly believing that only in this way could the legal bases of the controversial judgments be satisfactorily investigated. Nevertheless, Mr. Hendel does give us some clues which are helpful in the search for answers to the above questions.

In the first place, it is clear that Hughes had a tremendous regard for the dignity and prestige of the Supreme Court, and considered that this depended in no small measure upon the stability of its decisions and the avoidance of close divisions of opinion among its nine members. The desire to avoid too much dissent may have led him to side with the conservatives in invalidating the Agricultural Adjustment Act, while his regard for precedent may account for his attitude in the case of *Jones & Laughlin*, in upholding the activities of the National Labour Relations Board, which is alleged to have been a shift of position on his part. Mr. Hendel believes that Hughes' opinion here "followed logically in the path of his earlier interstate commerce decisions" (p. 265).

Secondly, Hughes brought to the Bench a wide experience of men and affairs, which may have prompted him to make a stand against the tide of reform at a time when many people in the States had begun to fear that it was flowing too fast, and which yet enabled him to recognise the inevitable in time to save the Supreme Court from drastic and possibly disastrous change. The plan to reorganise the Supreme Court was not only defeated in the Senate Committee but made unnecessary by the change of attitude in the Supreme Court, which in consequence emerged from the crisis shorn of none of its powers of review (and incidentally Mr. Hendel would like to see them curtailed).

In the third place, it seems likely that Chief Justice Hughes' name can be linked with that of Chief Justice Marshall. Both were great judicial statesmen. Mr. Hendel is confident that "no other justice, excepting John Marshall, played as vital a part and one so fraught with historic consequences in (American) constitutional history" (p. 260). While it may not yet be possible to pass final judgment upon Hughes' role in the New Deal crisis, it seems clear that it was neither insignificant nor despicable. Mr. Hendel is to be congratulated upon his careful and useful analysis.

J. E. Hall Williams.

Legislation for Press, Film and Radio. By Fernand Terrou and Lucien Solal. [Published by UNESCO.]

The object of this work is to survey the laws in force throughout the world so far as they affect the main methods of mass communication. It is a study in comparative law within a limited field and its appeal is practical rather than theoretical. That is to say that it exhibits the different ways in which similar problems have been approached by different systems of law, without attempting to draw conclusions, but in such a manner that anyone concerned with developments of his own national system may, by seeing how others have proceeded, select what he considers best in each.

The book has two main parts. The first, called "the Code of the Enterprise," deals with those aspects of the different national laws under which the organisation, be it firm, company or institution, which creates and distributes the subject-matter of mass communication, is formed, maintained and controlled. The second, called "the Code of Publication," deals with those aspects of law which relate to rights in and liabilities in respect of subject-matter, the law of libel, the law of copyright and the like. Finally the book deals with "the Code of the Profession," namely laws or regulations governing those whose profession is the production of news and radio or film material.

The first part contains much which is novel and of interest. Two points stand out. There is the contrast between the press and the film on the one hand, which follow the anticipated pattern of enjoying the greatest freedom from control in those countries in which the social and political bias lies most towards free enterprise, and the radio system on the other which, so far as legal forms at any rate are concerned, does not seem to fit the same pattern. The methods adopted of organising broadcasting vary from those permitting free and multiple enterprises, through a medley of systems of independent and quasi-independent monopolies to fully controlled state services, but legal independence does not always go with freedom in other fields. But, as the authors point out, the regulations relating to programmes sometimes impose a greater State control where the broadcasting body is operated by private enterprise than in those in which it is a public institution.

Secondly, there is the development in this field of what is basically a new sort of legal person, namely the independent non-profit-making organisation, enjoying freedom from both State and private control within the limits of its constitution. While the organisation of such a body is no doubt akin to that of the charitable trust which has long enjoyed popularity, the extent of social and political power which is possessed by any body concerned with news communication, particularly where the body possesses a monopoly, makes the development of such entities of high importance. The work under review devotes a good deal of space to the various constitutions of broadcasting enterprises of this nature, and indicates that consideration is given in various countries to the setting up of similar organisations for the press and for news agencies. Having regard to the form and object of the work it may not be legitimate criticism, but while the writers have set out the material from which conclusions may be drawn, they have failed to indicate any conclusions. But this part of the book does challenge reflection. One idea which occurs in contemplating this development is that the real independence of such a body must be proportional to the fearlessness or otherwise of state interference which the common law of the country concerned has inculcated in the individuals who compose the body. A second is to recall that it was a somewhat similar body which, "the Sleeper" in Wells' story found in control of the world when he eventually awoke.

The second part of the book seems less satisfactory, probably because it is dealing with less novel material and is attempting to summarise in a relatively small space the laws of many countries which are concerned only incidentally with the subject-matter of the present study.

Possibly the most interesting comparison in this part of the book is concerned with the different systems of establishing individual responsibility for press offences: in some countries a responsible manager has to be nominated, in others there is what is described as the "waterfall" method by which liability can be passed on from one to another, while, in the Anglo-Saxon system, the ordinary law of master and servant applies.

The law of defamation is dealt with at some length but the statement, though possibly qualified by its context, that under Anglo-Saxon law you may libel private individuals but not public servants, seems a little surprising.

There is an interesting observation in relation to copyright law that a work of literature is primarily public property and no more than a remuneration, in the shape of a longer or shorter concession, is due to the man who first gave life to a work which was, in essence latent in the community. This puts the opposite side to the argument, more often expressed, that a work of literature is peculiarly the property of the author and that any limitation on such right is introduced either as a consideration for protection given by the State or from the purely practical necessity of putting some term to the right. But the details of copyright law seem to contain certain inaccuracies. It is not correct for example that the law of Great Britain permits the reproduction without the author's consent of articles dealing with current

events. Nor is it correct that the ownership of copyright as between journalist and owner depends upon contract or custom, it depends upon a statutory provision vesting copyright in an employer.

The section dealing with the profession of journalism indicates that few countries possess any special system of law on this subject and the matter therefore rests upon the rules of private organisations.

The value of the whole work lies on its collection in one place of the legal provisions of many countries as they apply to a particular class of enterprise, which has ever-increasing power and influence as modern means of distribution are extended. It may usefully be read by anyone who is interested to learn the manifold ways in which similar problems have been solved or attempted under different forms of government or who is concerned to seek improvements of the law of his own country in this field.

F. E. Skone James.

Probation and Related Measures. United Nations Publications Sales Number 1951. IV.2. [New York : United Nations Dept. of Social Affairs. 1951. xvi and 407 pp. Distributed in this country by H.M.S.O. 22s. 6d.]

It is with a sense of relief that one turns from the increasingly problematic political activities of the U.N. Organisation to the work done by what may be termed its technical departments which have the opportunity and the means to examine a multitude of concrete and definite problems of great practical importance on an international level. This comprehensive comparative study is the first work in the field of prevention of crime and the treatment of offenders to be prepared by the Dept. of Social Affairs at the request of the Social Commission and the Economic and Social Council. It has been able to draw upon communications and reports prepared by numerous organisations and experts in many countries, but the result is much more than a mere compilation. In the field of probation experience of one country may be of immediate practical value to another; *Probation and Related Measures* should prove an essential handbook for anyone concerned with the shaping of penal policy anywhere.

This study is primarily concerned with adult probation defined as a "method of dealing with specially selected offenders, . . . consisting of the conditional suspension of punishment, while the offender is placed under personal supervision and is given individual guidance or treatment." Probation in this sense is described as "essentially an Anglo-American socio-legal institution," for it is only in the English and American practice that supervision has from the outset been closely associated with, indeed essential to, probation, whilst most continental countries, taking their start from the famous draft loi Bérenger, dealt with the conditional sentence as the primary legal institution and considered probationary supervision as an optional adjunct. This distinction is vital, for development in this country and in the United States has been from supervision to actual treatment; probation has in fact undergone a subtle but important change, until it is now, under the Criminal Justice Act, 1948, no longer to be considered as a measure designed to keep out of prison minor offenders and to give them another chance, but an integral part of a penal policy which aims throughout at reformation of delinquents. As one U.S. source here quoted puts it: "Probation is not to be interpreted as leniency or mercy, allowed because the court has been swayed emotionally. It is a form of treatment consciously chosen because there is reason to believe that the interests of society can be protected, while at the same time the needs of the offender can be met in this manner better than in any other."

Unfortunately there has been a tendency in this country among the public at large (and even among some magistrates) to regard probation as almost

equivalent to "being let off" or even to being found "not guilty," a misconception for which the wording of the 1907 Act was no doubt to some extent responsible, for it spoke of "releasing" an offender on probation, and in summary proceedings not only exempted him expressly from the imposition of any sentence but even from conviction. These matters have now been attended to in the 1948 Act, but a marked decline, compared with 1938, in the proportion of offenders placed under the supervision of probation officers and striking fluctuations in the use of probation by different courts suggest that the full possibilities of this measure have yet to be recognised in many cases where a fine or short term imprisonment are now normally imposed.

In order to "strengthen" probation and to render it "more effective" (which might ensure its wider use in this country), it has recently been suggested that in suitable cases the courts might be given power to impose a definite penalty as a warning, but to suspend its execution pending good behaviour over a certain period. This system of conditional suspension of punishment, in contrast to the Anglo-American method of suspending the imposition of sentence, is the one which was adopted by many countries on the Continent at the end of the nineteenth century and is still in force there. The difference is probably not a fundamental one in the sense that it can, by itself, make or mar, like effective supervision and treatment, the success of probation as a measure in the combat against crime, but the UN study considers carefully (on pp. 205–209) the relative advantages and disadvantages of the two methods from the point of purpose and potential scope of effective application. In the end the conclusion is here reached that "the claims of superiority on behalf of suspended execution of sentence . . . rest on rather insecure foundations" and the authors of *Probation and Related Measures* justifiably lay stress on the fact that the imposition of a definite sentence is not altogether in tune with the prevailing view of probation as an essentially non-punitive measure to be used conditionally as an alternative to punishment. A compromise solution is nonetheless by no means here ruled out which would allow the courts to use either alternative in appropriate cases, and this seems to have been practised with success in a number of states of the U.S.A. and more recently in Sweden.

The UN survey has wisely not attempted an exhaustive description of probation legislation and/or practice all over the world. It has instead given a detailed exposition of the present situation in six selected countries (U.S.A., U.K., New Zealand, Norway, Sweden and the Netherlands) and has concentrated on a comparative and critical analysis of problems common to them all. Of paramount importance for the success of probation the authors consider an exhaustive preliminary inquiry into the offender's personality, circumstances and needs as an indispensable foundation of any trial, an inquiry not intended to seek for mitigating factors which might justify conditional release, but as an assessment of the offender's susceptibility to reformative treatment and likely response to a probation order. Such preliminary inquiry, which would ideally include as a matter of routine a medical examination of every offender brought before the court, is in this country already fairly well established for juvenile offenders, but is often only rudimentary in the case of adults. It is encouraging to hear that "the medical, psychiatric and social examination of offenders before final disposition of the case and as a guide to treatment" is the subject of a special detailed study already undertaken by the UN Secretariat in collaboration with the World Health Organisation and other international bodies. Further complementary studies envisaged relate to "experimental projects in probation, the practical results of probation, and the financial aspects of the probation system." There can be no doubt that if these studies are carried out in the same searching and factual spirit as the work now before us, they will form one of the most important and comprehensive contributions ever made to the discussion of this subject. Already it is difficult to imagine how any country

contemplating probation legislation can afford to neglect this carefully compiled and well-documented work whose usefulness is enhanced by ample appendices of statutory texts, thorough indices and by a bibliography covering 284 items of general interest, in which the basic works are specially marked.

H. A. HAMMELMANN.

THE TECHNIQUE OF ADVOCACY. By JOHN H. MUNKMAN, LL.B. [London: Stevens & Sons, Ltd. 1951. xiv and 178 pp. 17s. 6d. net.]

ADVICE ON ADVOCACY IN THE MAGISTRATES' COURT. By F. J. O. CODDINGTON, M.A., LL.B. [Chichester: Justice of the Peace, Ltd. 1951. viii and 22 pp. 8s. 6d. net.]

NEW books on advocacy are rare, at any rate in this country, and a capable piece of work such as that of Mr. Munkman is accordingly very welcome. The author in his Preface makes claims to originality which are not quite borne out by his performance, and is also too scornful of his predecessors whom he tends to write off as negligible, yet some of these he quotes a good deal such as Weldon's useful *Art of Cross-Examination*, and of others he seems curiously unaware such as *Hints on Advocacy* by Harris which though an uneven and in parts prolix work has been the standby of several generations of budding young advocates.

Much the best part of Mr. Munkman's book, and much the longest section comparatively, is that devoted to cross-examination, and this is certainly the best treatment of this most difficult art that I am acquainted with. The points made are admirably illustrated from the classic performances of the leading modern cross-examiners, and any young advocate wishing to make himself proficient in this branch of his work cannot do better than study these chapters carefully.

Nevertheless the percentage of cases won and lost through cross-examination is not large, and the majority of successful advocates do not shine at it: indeed it probably plays no significant part in the majority of cases decided in the courts. Advocacy is essentially the art of presenting a case in such an attractive way as to win it, and this depends much more on thorough knowledge derived from hard work, and orderliness in presentment than on anything else, especially in modern times when, outside the criminal courts, juries are rare. Mr. Munkman is not unaware of these matters, but I do not think that he attaches anything like due importance to them. His chapter on "the Speeches" is hardly a quarter of the length of that on cross-examination, and his chapter on the hardly less important subject of general strategy and tactics, some four pages in length, seems to have been added as an afterthought. Yet how many cases have been won because the advocate knew his judge? And how many more have been lost because advocates did not know their judges? Mr. Munkman seems to think that all judges are Olympians dispensing impartial and objective justice—a pious theory much favoured by the legal profession on formal occasions such as banquets, but which, as every practising lawyer at the end of his first week in the courts knows, does not square with the facts.

Mr. Coddington whose "lighthearted address" to the Bradford Law Students' Society is so full of good things that it was well worth putting into permanent form is fully alive to such essential matters: if you don't know your court "go early if possible, make inquiries of the habitués, and listen to other trials"; golden counsel indeed.

Mr. Coddington's wisdom is specifically addressed to advocates in Magistrates' Courts—he was himself a stipendiary magistrate for many

years—but nearly everything which he says is equally applicable to advocacy in the higher courts. His address is compounded of a mixture of the vital principles of advocacy such as the attainment of clarity by attention to chronology with sage practical tips. He has also been fortunate enough to obtain from Sir Norman Birkett, perhaps the best all-round advocate of our generation, a foreword which is in the natufe of a short essay on advocacy and which is a gem of its kind. In it Sir Norman underlines and exemplifies many of the points made by Mr. Coddington and indicates what he regards as the fundamentals of the subject. Three shillings and sixpence might appear to a young man a lot to pay for fewer than thirty pages of print, but not if he reflects that there is hardly a page here which if properly mastered and applied to his work may not win him a case.

C.

TERRELL AND SHELLEY ON THE LAW OF PATENTS. Ninth Edition by K. E. SHELLEY, Q.C. [London : Sweet & Maxwell, Ltd. 1951. lxv and 679 pp. £5 5s.]

TERRELL ON PATENTS has for decades been the standard work on this branch of the law, and now that Mr. Shelley has presented a completely revised edition of great excellence it will remain the classical textbook on patent law. Mr. Shelley is one of the leaders of the patent bar and his writing breathes the atmosphere of the courts where patent law is dispensed and made. The emphasis is on court practice throughout. Out of 400 pages of text over 100 pages are devoted to the Action for Infringement, the Petition for Revocation and the Action to Restrain Threats, all of which come within the jurisdiction of the courts. Procedure in the Patent Office is dealt with scantily, but this is deliberate and frankly admitted in the Preface. For the law of trade marks the standard work by Kerly and Lloyd is supplemented by Mrs. Moses' *Trade Mark Practice* at the Patent Office, but the gap on patent practice in the Patent Office and the Patent Appeals Tribunal remains to be filled. It has always been a feature of Terrell to quote verbatim extracts from leading judgments on each topic; this useful method has been followed by Mr. Shelley and quotations from many new important cases decided since the previous edition was published in 1934 have been included.

It goes without saying that the work is based on the Patents Act, 1949, and the various Rules, Orders and Statutory Instruments which accompany the new Act. Most of these Rules and several other statutes affecting patent law have been reprinted in the Appendix, but the following have been omitted for no apparent reason: Development of Inventions Act, 1948, Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948, Public Offices Fees (Patents, Designs and Trade Marks) Order, 1940, S.R. & O. 1940, No. 911; the latter is not even mentioned in the text. While the Royal Commission on Awards to Inventors is nearing the completion of its task, a short reference to its functions ought to have been included in the chapter on Crown Use. One page and a quarter on the vital subject of income tax and surtax as they affect patentees is really not enough, even if one concedes that a full treatise on this subject belongs in books on taxation. In the summary on stamp duty the changes in the law brought about by the Finance Act, 1947, have been neglected. On pp. 264 and 370 it is said that a plaintiff who has had to discontinue his action owing to the defendant pleading the existence of a contract containing an unlawful tying clause may commence a fresh action against the same defendant after the offending contract has been terminated and may if successful recover damages for infringements committed while the offending contract was in force. The statement that the patentee can start fresh proceedings after termination of the offending contract is correct, but the old case cited by Mr. Shelley according to which he can

recover damages for the period before termination is no longer good law under section 57 (2) of the Patents Act, 1949.

Apart from these minor points, Mr. Shelley is always correct, lucid, complete and authoritative. The reader and the practitioner will find in his book all they want to know on the patent law and patent practice in the courts as they stand today. In addition, Mr. Shelley has the courage to criticise decisions which in his submission are wrong, and offers constructive criticism on certain aspects of patent law which in spite of the comprehensive reform in 1949 still need changing; see, for example, the problem of the interpretation of claims and the rule as to equivalents on p. 151. On the other hand, Mr. Shelley in his preface gives credit to the beneficial changes brought about by the legislation of 1949, particularly regarding patents of addition and the chance they offer to the patentee to remedy unlucky drafting of his original complete specification or claims. The reviewer shares Mr. Shelley's hope that the changes in the 1949 Act will enhance the value of patents and give the inventor increased confidence in the protection patents afford to his creation. Mr. Shelley's work in turn will be a useful tool in the hands of the lawyer who strives to protect the inventor against infringement of his rights.

PETER MEINHARDT.

PLANNING APPEALS. By HAROLD J. BROWN, Barrister-at-Law. [London: Sweet & Maxwell, Ltd. 1951. 87 and Tables xv pp. 12s. 6d.]

THERE is always difficulty in envisaging how a statute works in practice, what sort of change is a material change of user, where are the borderlines between the different classes of use to be drawn, how do the claims of national interest control or affect purely aesthetic considerations in town and country planning? These and a host of similar questions can worry both practitioners who are not constantly involved in planning questions and lawyers in universities—whether formally students or not. One answer is to read all the periodical Bulletins of Appeal Decisions. It is not, however, only the less conscientious who will welcome the present book which digests the decisions under various heads, and in addition, gives a good account of the law and practice of planning appeals. Reading it can also make even confirmed opponents of central control pause and think. The decisions make it evident that without the intervention of the Ministry the control of development might have been much more rigid than it is. For anyone wishing to know something of the working of the Town and Country Planning Act who has not already had occasion to make himself an expert this is a welcome and readable book.

J. D. B. MITCHELL

A GUIDE TO COMPULSORY PURCHASE. By R. D. STEWART-BROWN. [London: Sweet & Maxwell, Ltd. 1951. 76 pp. and Appendices 20 and Tables xiii. 10s. 6d.]

THIS again is not a book for experts, it first appeared as a Current Law Guide. It is a mark of the increased technicality of law that important branches which may affect anyone at some time are not easy to grasp by those who have had only a limited contact. For such is this book intended and it will serve their turn well. It covers the procedure, subject-matter, and effect of compulsory purchase orders. The Appendices summarise the main powers. A great part of it is taken up with the problem of compensation, which has in some respects been simplified of late, and the main principles emerge clearly. Something more might have been said of compulsory "easements" under such

Acts as the Civil Aviation Act, and while no one could expect a book of this sort to enter into the welter of natural justice cases, perhaps some more of the more recent ones might have been mentioned as well as *Franklin's Case* since that presented some features which could distinguish it from ordinary compulsory purchase cases. Again the treatment of the effect of compulsory purchase on leases by reference to cases which were primarily requisitioning cases is not entirely clear. Those are minor defects and it would be unfair not to rate the present book as a reliable and clear guide for which many will have cause to be grateful.

J. D. B. Mitchell.

Clarke Hall and Morrison's Law Relating to Children and Young Persons. Fourth Edition. By A. C. L. Morrison, C.B.E., and L. G. Banwell. Incorporating the Children Act, 1948, and the Nurseries and Child-Minders Regulation Act, 1948, annotated by M. M. Wells, M.A. Revised for this edition by the Editors in collaboration with Joan D. Cole, B.Sc. [Butterworth & Co. (Publishers), Ltd. 1951. xxxvi and 615 and 27 pp. 75s. net.]

Handbook of Child Law. Fourth Edition. By John Stevenson and Lawrence Hague. [Sir Isaac Pitman & Sons, Ltd. 1952. xv and 588 pp. 40s. net.]

The new editions of these well-known books incorporate the important legislation of the last few years relating to children, especially the Children Act, 1948, and the Adoption Act, 1950. It is significant of the trend of this legislation that the first of these books, intended principally for use by juvenile court magistrates, should now be nearly identical in content with the second written for the officers of local authorities. They remain, however, different in arrangement and in the selection of provisions for comment.

Both books have proved themselves in practice, but they remain collections of annotated statutes without that systematic account of the law which their titles seem to promise. *Clarke Hall and Morrison* contains a number of excellent, but tantalisingly brief, Introductory Notes. If the authors could be persuaded to expand these notes into an institutional exposition they would help to fill an astonishing gap in our legal literature and ensure an even greater measure of gratitude from all concerned in the administration of the law

J. U.

Palmer's Company Precedents, Part II, Winding Up. Sixteenth Edition by His Honour A. F. Topham, K.C., LL.M., Bencher of Lincoln's Inn. [London: Stevens & Sons. 1952. xcix and 1144 pp. £6 10s.]

In the April issue of this Review (at p. 266) a hearty welcome was extended to Part I of this invaluable book. Before his untimely death the learned editor was able to complete the work on this second volume with his usual care and skill. In general the changes made are less substantial than in the earlier volume, but the stricter arrangements made by the latest Act regarding Declarations of Solvency, the new Winding-Up Rules, and the minority shareholders' new alternative remedy to winding up in the event of oppression (s. 210), have necessitated some substantial alterations and additions.

It is unhappily indicative of steeply rising prices that this volume, though

nearly 100 pages shorter, costs £1 more than the first volume which appeared only a few months earlier. But, despite its price, it remains indispensable to every company law practitioner.

L. C. B. G.

RUSSELL ON ARBITRATION. Fifteenth Edition. By T. A. BLANCO WHITE of Lincoln's Inn, Barrister-at-Law. [London: Stevens & Sons. 1952. xxxviii and 412 pp. £8 10s.]

IT is good to find that someone has at long last taken in hand a complete reconstruction of Russell's authoritative but, in recent editions, badly arranged and confusing book. The work is now expressed not as a commentary on the Act, but in the form of a narrative divided into chapters. In the main the text has merely been rearranged and not rewritten, but the reorganisation of material and the resetting of the type have produced an immense improvement in intelligibility. As a result arbitrators and their advisers should at least be able to find their way about, even if lay arbitrators may sometimes fail to understand what they find. There is still room for further improvement but the learned editor is to be congratulated on a big step forward.

L. C. B. G.

THE INCOME TAX ACT, 1952, ANNOTATED. By Miss H. G. S. PLUNKETT, Barrister-at-Law (formerly one of H.M. Inspectors of Taxes). [Sweet & Maxwell, Stevens & Sons, and W. Green & Son. 1952. 80s].

CURRENT LAW INCOME TAX ACTS SERVICE (CLITAS). General Editor JOHN BURKE, Barrister-at-Law. [Sweet & Maxwell, Stevens & Sons, and W. Green & Son. £8 10s. Subscription for 1952 £1 10s.]

THE new Income Tax Act, while it will ultimately be an inestimable boon, presents the profession with a headache until we get used to finding our way about in it. There is, therefore, a very real need for annotated editions of it and, in particular, for Tables of Comparison enabling us to trace the old familiar sections of past Finance Acts in their new guise. To this need the Law Publishers have responded promptly and efficiently.

The first of these books (reprinted from *Current Law Statutes*) is a copy of the Act, with a brief but helpful commentary to each section, references to the appropriate sections of *Konstam*, Tables of Comparison and an Index.

CLITAS, in addition to incorporating the other book, is designed to provide an exhaustive, up-to-date and annotated collection of all relevant Statutes, Bills, Resolutions and Regulations in a convenient loose-leaf form. Since its original publication it has been decided to include optional sections (for which an additional charge will be made) dealing with Profits Tax and E. P. L. The resulting service will be invaluable.

L. C. B. G.

THE JURYMAN'S HANDBOOK. By ALEC BROWN. [London: The Harvill Press, Ltd. 1951. 152 pp. 10s. 6d. net.]

IT was a good idea on the part of Mr. Brown to write a handbook for jurymen. There must be many among those called for jury service who take their duties seriously enough to wish for some instruction, and who cannot find any; or who could not do so until this book appeared, for so far as I know it is the first of its kind. It is also a disturbing reflection that during

a period of 10 years' active practice at the bar, during which I was frequently in courts where juries were at work, I never once heard a judge give any advice to a jury as to how they should go about their business, except of course the instructions in the summing up on such matters as the need for confining themselves to questions of fact.

My impression is, however, that what was required was a modest volume in the nature of a pamphlet costing not more than, say, half a crown. It seems to me unlikely that more than a minute fraction of jurymen will be prepared to go to half a guinea for their instruction. And even if I am wrong about that I could hardly advise them to pay so much for Mr. Brown's book, for the amount of honest-to-goodness instruction which they will find in it could in fact have been compressed into a pamphlet of the 80 or 40 pages which I have in mind. The truth is that while there is a good deal of useful information in the book there is much too much repetition, a deal of unnecessary eulogising of the English court system, and a rather wearisome iteration of the usefulness, the necessity, the privilege of jury service.

The most useful chapter in the book, and also the longest, is entitled "The Juror on Duty," and in this Mr. Brown does run over the main points which affect a juryman while he is actually at work in a case, though even this chapter is not free of a substantial amount of moralising. Other chapters which could have been valuable had they been better done are on "Evidence and Avoiding Prejudice in Regard Thereto," and on "Counsel—How to Assess." Two final chapters discuss the spread of the jury system through the British Colonial Empire and through the world generally. There are a number of appendices, some of which contain information likely to interest jurors a good deal, such as those on "Payment of Expenses" and "Qualification for Jury Service."

On the whole, when he is dealing with fact, Mr. Brown is an accurate guide, but there are a number of slips. For example, it is not usual, as suggested at p. 52, for a warder to produce a prisoner in the dock until told to "put up A. B." by the clerk of the court. And Mr. Brown must have somehow hit on an unusual case from which to generalise his statement that it is customary for the court usher to suggest to the jury who should be their foreman. Juries frequently choose their own foreman, but within my own observation they are usually content to pick on the man who first goes into the box, *i.e.*, whose name is called first. At p. 89 there is a badly constructed and misleading paragraph about the right of counsel "to colour their interpretation of the evidence." It is, of course, legitimate for counsel to suggest interpretations of the evidence, and defence counsel may often be rather colourful about it, but it is the recognised duty of prosecuting counsel to remain strictly impartial, and Mr. Brown would have been better employed in pointing this out than in making so misleading a statement. It must often puzzle a jury to find how different is the emotional approach of prosecuting counsel from that of defending counsel, and many a prisoner must have owed his verdict to that fact, for the jury can hardly believe that a pleader who is so lacking in emotion as prosecuting counsel usually is, really believes in his case.

Incidentally, tucked away rather irrelevantly in the chapter on "Counsel—How to Assess," there is one of the most valuable points in the book, that is a section on the importance of note-taking. It is not at all common to see a juryman taking notes, yet in a long and difficult case such a note might be of the greatest help to him and his fellows at the time they were reaching their verdict. If judges were to adopt the plan, as with advantage they might, of beginning jury cases with a short address to the jury as to how they should set about their work, one of the most useful hints they could give would be that juries should take notes, for which purpose they should be provided with paper and pencils.

C.

UNIVERSITY

UNITED NATIONS PAMPHLETS: THE IMPACT OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS; THE SUPPRESSION OF SLAVERY. [Published by UNO and distributed in this country by H.M. Stationery Office. 1s. 9d. and 8s. 9d.]

These two pamphlets of the United Nations are very different in character. The one is enlightened propaganda; the other is pure information. It is the aim of the former to show that the Universal Declaration of Human Rights is a historic act, comparable with Magna Charta, the American Declaration of Independence, and the French Declaration of Rights of Man as a landmark in the struggle for liberty and fundamental freedoms. It is claimed that the Declaration has had a marked impact in the thought and action of individuals and organisations, and in progressive measures, national and international. The paeans which greeted it are certainly impressive verbally. But the uneasy question forces itself: "What does it mean in practice"? Hitherto the States that signed it have refused to adopt any covenant or convention defining some of the rights in any form which would be binding and enforceable. They have resisted any form of implementation which would allow the individual or the group to complain to an international authority of denial of the rights. In view of this attitude, the fact that the Declaration has been translated into 86 languages, that a Human Rights Day is celebrated annually, that UNESCO collects each year festive messages about it, is less convincing. Yet some moral force must be conceded. The Declaration has frequently been cited as a basis of action at the Assembly of the United Nations and by the Special Agencies of the United Nations. Some of its articles have been embodied in the constitutions of new States, and have been taken as a standard in judgments of the International Court and of many national courts.

The second pamphlet is a useful memorandum on the international action which has been taken, since the beginning of the nineteenth century, to put down slavery in any and every form. It deals particularly with the work of the League of Nations. The machinery for the regular collection of information about the problem of slavery was destroyed by the second world war. It needs to be re-established.

N. B.

Books and Publications received:—

GREEN'S DEATH DUTIES. Third Edition. By H. W. HEWITT, LL.B. The Treatment of Legacy and Succession Duties revised by O. M. W. SWINGLAND, LL.B. [Butterworth & Co., Ltd. 1952. 75s. net.]

SUMMARY MAINTENANCE AND GUARDIANSHIP ORDERS. By A Magistrates' Clerk. Oyez Practice Notes No. 80. [The Solicitors' Law Stationery Society, Ltd. 1952. 8s. 6d. net.]

NOTES ON JUVENILE COURT LAW. By A. C. L. MORRISON, C.B.E. Second Edition. 1952. [Published by Justice of the Peace and Local Government Review, Little London, Chichester, Sussex. 2s. 6d. net.]

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